

Supreme Court of the United States
OCTOBER TERM, 1973

No. 72-6520

KINNEY KINMON LAU, a Minor by and through
MRS. KAM WAI LAU, his Guardian ad Litem, ET AL.,
Petitioners,
vs.

ALAN H. NICHOLS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

- March 25, 1970 — Plaintiffs' Complaint for Injunction and Declaratory Relief filed in United States District Court for the Northern District of California.
- April 8, 1970 — Order to Show Cause issued.
- April 17, 1970 — Plaintiffs propound Interrogatories to Defendants.
- April 27, 1970 — Defendants' Motion to Dismiss filed.
- May 4, 1970 — Defendants' affidavits of Wellington Chew, Yvon Johnson, and Isadore Pivnick filed.
- May 12, 1970 — Stipulation entered into by Plaintiffs and Defendants.
- May 26, 1970 — Defendants' Answer to Complaint for Injunction and Declaratory Relief filed.
- May 26, 1970 — Defendants' affidavit of Edward D. Goldman filed.
- May 26, 1970 — Defendants' Answers to Interrogatories propounded by Plaintiffs filed.
- May 26, 1970 — Plaintiffs' affidavit of Edward H. Steinman filed.
- May 26, 1970 — Plaintiffs' Exhibits Numbers 1-8 admitted into evidence.
- May 26, 1970 — Order of United States District Court for Northern District of California entered.

- June 22, 1970 — Plaintiffs' Notice of Appeal filed.
- Jan. 8, 1973 — Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit entered.
- June 11, 1973 — Order of Supreme Court of United States granting petition for writ of certiorari and motion for leave to proceed *in forma pauperis* entered.
- June 18, 1973 — Supplemental Order of the United States Court of Appeals for the Ninth Circuit entered.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-70 627LHB

KINNEY KINMON LAU, a Minor by and through MRS. KAM WAI LAU, his Guardian ad Litem; DAVID LEONG, a Minor by and through YUE BEW LEONG, his Guardian ad Litem; JOAN YEE, a Minor by and through MRS. FUNG YEE YEE, her Guardian ad Litem; PAULETTE CHEUNG, a Minor by and through KUN CHEUNG, her Guardian ad Litem; JUDY SUN, a Minor by and through MRS. JULIA SUN, her Guardian ad Litem; WAILY TOM, a Minor by and through MRS. CHOI KAM TOM, his Guardian ad Litem; KAREN YEE, a Minor by and through MRS. FUNG YEE YEE, her Guardian ad Litem; KAREN CHIU, a Minor by and through MRS. MOY HOR CHIU, her Guardian ad Litem, and DAVID SUN, a Minor by and through MRS. JULIA SUN, his Guardian ad Litem, individually on their own behalf and on behalf of all others similarly situated,

KIT LING LEE, a Minor by and through HENRY LEE, her Guardian ad Litem; STANLEY CHEUNG, a Minor by and through KUN CHEUNG, his Guardian ad Litem; SAI CHONG LEE, a Minor by and through HENRY LEE, his Guardian ad Litem; and SAI HO LEE, a Minor by and through HENRY LEE, his Guardian ad Litem, individually on their own behalf and on behalf of all others similarly situated, PLAINTIFFS

vs.

ALAN H. NICHOLS, President, and DR. LAUREL E. GLASS, DR. ZURETTI L. GOOSBY, EDWARD KEMMITT, MRS. ERNEST R. LILIENTHAL, HOWARD N. NEMROVSKI, DR. DAVID J. SANCHEZ, JR., in their official capacities as members of the Board of Education of the San Francisco Unified School District; DR. ROBERT E. JENKINS, Superintendent of the San Francisco Unified School District; and MRS. DIANNE FEINSTEIN, President, and

JOHN J. BARBAGELATA, ROGER BOAS, JOHN A. ERTOLA,
TERRY A. FRANCOIS, ROBERT E. GONZALES, JAMES
MAILLIARD, ROBERT H. MENDELSON, RONALD PELOSI,
PETER TAMARAS, MRS. DOROTHY VON BEROLDINGEN, in
their official capacities as members of the Board of
Supervisors of the City and County of San Francisco,
DEFENDANTS

COMPLAINT FOR INJUNCTION AND DECLARATORY RELIEF
(Civil Rights)—Filed March 25, 1970

I

PRELIMINARY STATEMENT

1. This action, brought under 28 U.S.C. §§ 1331, 1343 (3) (4), seeks to provide plaintiffs and all others similarly situated with their right to an education. Such a fundamental right is guaranteed by the Constitution of the United States, the Constitution of the State of California, and laws enacted by the California State Legislature.

2. At present, plaintiffs and *at least* 2,850 other Chinese-speaking students languish in San Francisco Unified School District classrooms, unable to either understand or communicate in the English language. None of these thousands of students reads, speaks, or comprehends the English language sufficiently to function in the classroom, let alone to function in this society.

3. Of these students, nearly two-thirds—or at least 1,800 Chinese-speaking students—receive no special instruction or help in English. These students, who comprise the first class of plaintiffs in this action, are completely denied any opportunities to benefit from the educational curriculum.

4. The other 1,050 Chinese-speaking students do receive some special instruction in the English language. Yet, most of these students—of whom the second class of plaintiffs in this action is representative—are taught only by non-Chinese speaking teachers. In addition, only one-half of these students receive such instruction in full-time, specially designed classes. The rest receive part-

time instruction, for less than one hour per day, taught by regular classroom teachers, parents, and volunteers.

5. Defendants' failure to provide plaintiffs and nearly 3,000 other Chinese-speaking students with special, full-time instruction in English, taught by bilingual teachers, deprives them of both an education and equal educational opportunities. Since regular classes are taught exclusively in English, they cannot understand any of what transpires. Since English is the dominant language in this society, they are—and will be—severely disadvantaged in competing for employment, housing, higher education, and the like. For many, the defendants' denial of an education dooms them inevitably to become dropouts and to join the rolls of the unemployed.

6. This action, therefore, seeks injunctive and declaratory relief to prevent the deprivation of plaintiffs' rights to an education. Such deprivation violates plaintiffs':

(a) Rights to an education under the Fifth, Ninth, and Fourteenth Amendments of the Constitution of the United States, under Article IX, Section 5 of the Constitution of the State of California, and under California Education Code §§ 1051, 1054, 5011, 5012, 5015, 5652, 12101;

(b) Rights to equal protection of the laws and equal educational opportunities under the Fourteenth Amendment of the Constitution of the United States and under Article I, Sections 11 and 21, and Article IV, Section 25, of the Constitution of the State of California;

(c) Rights to equal educational opportunities under the Civil Rights Act of 1964 (codified in 42 U.S.C. §§ 2000d, 2000d-1);

(d) Rights to learn English, as demonstrated in Article II, Section 11, and Article IV, Section 24 of the Constitution of the State of California, in California Education Code §§ 71, 5766, 5770, 5779, 6060, 6450, 6499.200, 6750, 8551(a), 8571(a), 8573, 12820, and in California Code of Civil Procedure §§ 185, 198 (2)(3); and

(e) Rights to receive special instruction in English from bilingual teachers, proficient in the plaintiffs' native language, as demonstrated in California Education Code §§ 71, 5766, 6457, 13187.6.

II

JURISDICTION

1. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331 and by 28 U.S.C. §§ 1343(3)(4), which provide original jurisdiction in suits authorized by 42 U.S.C. § 1983. The amount in controversy in this action exceeds the sum of \$10,000, exclusive of interests and costs.

2. Declaratory judgments are authorized by 28 U.S.C. §§ 2201 and 2202.

III

PLAINTIFFS

1. Plaintiffs KINNEY KINMON LAU, DAVID LEONG, JOAN YEE, PAULETTE CHEUNG, JUDY SUN, WAILY TOM, KAREN YEE, KAREN CHIU, and DAVID SUN and all others similarly situated [hereinafter referred to as "First Class of Plaintiffs"] are all Chinese-speaking children residing in San Francisco, California, who suffer from defendants' actions complained of herein. Members of the First Class of Plaintiffs are enrolled in free public elementary and secondary schools administered and maintained by defendants. Neither the named plaintiffs nor other members of the First Class of Plaintiffs can read or write or speak English. Furthermore, none receive any special instruction in English, though they attend regular classes at their respective schools for over six hours each school day.

(a) Plaintiff KINNEY KINMON LAU resides at 740 Broadway, San Francisco, California, with his mother, Guardian ad Litem MRS. KAM WAI LAU, and father. He is six years old and is enrolled in regular classes in the first grade at Jean Parker School.

(b) Plaintiff DAVID LEONG resides at 848 Stockton, San Francisco, California, with his father, Guardian ad Litem YUE BEW LEONG, and mother. He is 14 years old and is enrolled in regular classes in the seventh grade at Marina Junior High School.

(c) Plaintiff JOAN YEE resides at 1407 Mason, San Francisco, California, with her mother, Guardian ad Litem MRS. FUNG YEE YEE, and father. She is nine years old and is enrolled in regular classes in the third grade at Jean Parker School.

(d) Plaintiff PAULETTE CHEUNG resides at 340 Willard, San Francisco, California, with her father, Guardian at Litem KUN CHEUNG, and mother. She is 14 years old and is enrolled in regular classes in the eighth grade at Roosevelt Junior High School.

(e) Plaintiff JUDY SUN resides at 1517 Taylor, San Francisco, California, with her mother, Guardian ad Litem MRS. JULIA SUN, and father. She is seven and one-half years old and is enrolled in regular classes in the second grade at Jean Parker School.

(f) Plaintiff WAILY TOM resides at 654 Jackson, San Francisco, California, with his mother, Guardian ad Litem MRS. CHOI KAM TOM. He is six years old and is enrolled in regular classes in the first grade at Commodore-Stockton School.

(g) Plaintiff KAREN YEE resides at 1407 Mason, San Francisco, California, with her mother, Guardian ad Litem MRS. FUNG YEE YEE, and father. She is eight years old and is enrolled in regular classes in the second grade at Jean Parker School.

(h) Plaintiff KAREN CHIU resides at 1916 1/2 Mission, San Francisco, California, with her mother, Guardian ad Litem MRS. MOY HOR CHIU, and father. She is 11 years old and is enrolled in regular classes in the sixth grade at Marshall School.

(i) Plaintiff DAVID SUN resides at 1517 Taylor, San Francisco, California, with his mother, Guardian ad Litem MRS. JULIA SUN, and his father. He is six and one-half years old and is enrolled in regular classes in the first grade at Jean Parker School.

2. Plaintiffs KIT LING LEE, STANLEY CHEUNG, SAI CHONG LEE, and SAI HO LEE and all others similarly situated [hereinafter referred to as "Second Class of Plaintiffs"] are all Chinese-speaking children residing in San Francisco, California, who suffer from defendants' actions complained of herein. Members of the Sec-

ond Class of Plaintiffs are enrolled in free public elementary and secondary schools administered and maintained by defendants. Neither the named plaintiffs nor other members of the Second Class of Plaintiffs can read or write or speak English. Unlike members of the First Class of Plaintiffs, members of the Second Class of Plaintiffs do receive some special instruction in English. Yet, this instruction is taught only by non-Chinese speaking teachers and generally on a part-time basis only.

(a) Plaintiff KIT LING LEE resides at 3133 16th Street, San Francisco, California, with her father, Guardian ad Litem HENRY LEE, and mother. She is six years old and is enrolled in regular classes in the second grade at Marshall Annex School.

(b) Plaintiff STANLEY CHEUNG resides at 340 Willard, San Francisco, California, with his father, Guardian ad Litem KUN CHEUNG, and mother. He is nine years old and is enrolled in regular classes in the third grade at Lafayette School.

(c) Plaintiff SAI CHONG LEE resides at 3133 16th Street, San Francisco, California, with his father, Guardian ad Litem HENRY LEE, and mother. He is 11 years old and is enrolled in regular classes in the sixth grade at Marshall School.

(d) Plaintiff SAI HO LEE resides at 3133 16th Street, San Francisco, California, with his father, Guardian ad Litem Henry Lee, and mother. He is eight years old and is enrolled in regular classes in the third grade at Marshall School.

IV

DEFENDANTS

1. Defendants ALAN H. NICHOLS, President, and DR. LAUREL E. GLASS, DR. ZURETTI L. GOOSBY, EDWARD KEMMITT, MRS. ERNEST R. LILIENTHAL, HOWARD N. NEMEROVSKI, and DR. DAVID J. SANCHEZ, JR., are members of the Board of Education of the San Francisco Unified School District. In their official capacities as Board members, they are re-

sponsible—under laws enacted by the California State Legislature—for maintaining and administering all elementary and secondary public schools within the City and County of San Francisco.

2. Defendant DR. ROBERT E. JENKINS is Superintendent of the San Franscico Unified School District. As such, he is responsible for administering the elementary and secondary public schools within the City and County of San Francisco.

3. Defendants MRS. DIANNE FEINSTEIN, President, and JOHN J. BARBAGELATA, ROGER BOAS, JOHN A. ERTOLA, TERRY A. FRANCOIS, ROBERT E. GONZALES, JAMES MAILLIARD, ROBERT H. MENDELSOHN, RONALD PELOSI, PETER TAMARAS, and MRS. DOROTHY VON BEROLDINGEN are members of the Board of Supervisors of the City and County of San Francisco. In their official capacities as Supervisors, they have overall responsibility—under laws enacted by the California State Legislature—for operation of all elementary and secondary public schools within the City and County of San Francisco.

V

STATEMENT OF THE CLAIM

1. Education for children between the ages of six and 16 is no longer a mere privilege, but a legally enforceable right. Such a right to an education now exists under the Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States, under Article IX, Section 5 of the Constitution of the State of California, and under California Education Code §§ 1051, 1054, 5011, 5012, 5015, 5652, and 12101.

2. The right to an education in the State of California assumes the right to learn English, the dominant language. Since regular classes are taught exclusively in English, plaintiffs and all others similarly situated must be able to sufficiently speak, understand, read, and write the English language to both benefit from the educational curriculum and function effectively in the classroom.

3. Furthermore, to function effectively in the society at large, plaintiffs and all others similarly situated must possess a command of the English language. Without such command, they will be severely disadvantaged in competing for employment, housing, higher education, and the like. Without such knowledge of English, they will be unable to exercise their right to vote (Article II, Section 11 of the Constitution of the State of California); unable to serve as jurors (California Code of Civil Procedure § 198(2)(3)); unable to graduate from a California high school (California Education Code § 8578); and unable even to comprehend the pleadings and other aspects of this action (Article IV, Section 24 of the Constitution of the State of California; California Code of Civil Procedure § 185).

4. The right—as well as the need—to learn English in school has been especially recognized by the State of California. Section 71 of the California Education Code provides an explicit State policy to “insure the mastery of English by all pupils in the schools.” Thus, English is a required course of study in all elementary and secondary grades in California. California Education Code §§ 8551(a), 8571(a).

5. To implement and strengthen its policy to “insure the mastery of English,” the California State Legislature has enacted numerous programs, including the Special Elementary School Reading Instruction Program (California Education Code §§ 5770, *et seq.*); Special Programs or Classes in English for Elementary School Pupils (California Education Code §§ 6060, *et seq.*); the Special Compensatory Educational Programs for Disadvantaged Children (California Education Code §§ 6450, *et seq.*); the Educational Improvement Act of 1969 (California Education Code § 6499.200); and the Educationally Handicapped Minors Program (California Education Code §§ 6750, *et seq.*). See also Title I of the Elementary and Secondary Education Act of 1965 (codified in 20 U.S.C. § 241).

6. In addition, the State of California has recognized that non-English speaking children will master English only through bilingual instruction. In seeking to “insure

the mastery of English," Section 71 of the California Education Code explicitly encourages bilingual instruction "in those situations when such instruction is educationally advantageous." Similarly, both the Bilingual Education Demonstration Program of 1969 (California Education Code § 5766) and Sections 6457 and 13187.6 of the Education Code were enacted

to encourage bilingual instruction in order [that non-English speaking students] develop a greater proficiency in English in accordance with the general policy specified in Section 71 of the Education Code.

Title VII of the Elementary and Secondary Act of 1965, which focuses on bilingual education, was enacted for the very same reasons. 20 U.S.C. § 241.

7. Currently, defendants admit that approximately 2,850 Chinese-speaking students enrolled in the San Francisco Unified School District are unable to sufficiently speak, understand, read, or write the English language to function in a regular classroom. The figure of 2,850 Chinese-speaking students is taken from a December, 1969 survey of San Francisco elementary and secondary students needing special help in English. The survey was conducted, in part, by the Chinese Bilingual Education Program of the Board of Education of the San Francisco Unified School District.

8. Of these 2,850 Chinese-speaking students, the survey shows 1,800—including plaintiffs KINNEY KIN-MON LAU, DAVID LEONG, JOAN YEE, PAULETTE CHEUNG, JUDY SUN, WAILY TOM, KAREN YEE, KAREN CHIU, and DAVID SUN, and other members of the First Class of Plaintiffs—receive no special instruction or help in English.

9. The other 1,050 Chinese-speaking students reported in the survey do receive some special help in English. For most of these students—including plaintiffs KIT LING LEE, STANLEY CHEUNG, SAI CHONG LEE, SAI HO LEE, and other members of the Second Class of Plaintiffs—such help is given by non-Chinese speaking teachers. For all 1,050 students, their placement in the

limited number of special classes is arbitrary, based on neither testing procedures nor ascertainable standards.

10. Furthermore, only one-half of these 1,050 students receive such instruction in full-time, specially designed classes. These classes are administered by the Chinese Bilingual Education Program. For the other one-half of these 1,050 students, special instruction lasts less than one hour a day, is part of the regular curriculum, and is taught by regular classroom teachers, parents, and volunteers.

11. The facts demonstrate that plaintiffs in both classes receive in fact no education and no program of instruction. To deprive 1,800 Chinese-speaking students in the First Class of Plaintiffs of any special instruction in English is to deprive them of an education. Likewise, to give members of the Second Class of Plaintiffs such instruction, but taught by non-Chinese speaking teachers and generally for only 50 minutes a day, is also tantamount to no education.

12. Further, plaintiffs contend defendants' survey results of 2,850 "needy" students grossly under-estimates the actual number needing special instruction in English. In November of 1967, defendant DR. ROBERT E. JENKINS reported that 2,455 Chinese-speaking students needed special instruction in English. Since then, *at least* 2,000 newly-arrived immigrants who speak only Chinese have entered San Francisco schools, needing special instruction in English. Yet, incredibly, the December of 1969 survey reflects only an increase of 400 Chinese-speaking students needing special help in English since November of 1967.

13. Nevertheless, plaintiffs are aware that exact figures are not crucial. What is crucial is that thousands of Chinese-speaking students are not receiving any special instruction in English. And, it is further significant that of those 1,050 students receiving such instruction, most receive no benefit due to non-Chinese speaking teachers and to limited help given by untrained teachers. Hence, these students in both the First and Second Classes of Plaintiffs are being denied their rights to an education, rights guaranteed by the Constitution of the United

States, the Constitution of the State of California, and laws enacted by the California State Legislature.

14. Plaintiffs further allege defendants have long been aware of this denial of plaintiffs' rights to an education, but have refused to take any steps to remedy it. As already demonstrated, defendant JENKINS more than two years ago reported 2,455 Chinese-speaking students in the public schools needed special instruction in English. At the time of that report, less than one-fifth of these students—473—were receiving such full-time instruction, primarily from non-Chinese speaking teachers.

15. In addition, plaintiffs contend the deprivation of the rights to an education among Chinese-speaking students is worsening. The school district's Chinese Bilingual Education Program estimates more than 1,000 Chinese-speaking immigrant students enter San Francisco public schools each year. Of these newly-arrived students, the Program reports more than 90 percent need special instruction in English.

16. Again, plaintiffs contend defendants' figure of 1,000 students grossly under-estimates the actual number of Chinese-speaking immigrant students annually entering the schools. The Economic Opportunity Council of San Francisco, Program Unit Office, estimates 5,000 Chinese immigrants now settle annually in San Francisco. Plaintiffs contend at least one-third of these Chinese immigrants—1,670—are school-age children entering San Francisco schools.

17. But, whatever the annual figure of Chinese-speaking immigrants entering the schools, defendants have made no plans to cope with the situation. In fact, the Chinese Bilingual Education Program of the Board of Education of the San Francisco Unified School District estimates its 1970-71 budget request will provide special full-time instruction to only 630 Chinese-speaking students. Even if the Program receives every cent requested, defendants will be denying such help to thousands of needy Chinese-speaking students. Since the parents of these students can neither read nor write nor speak English, these thousands of students will be unable to compensate for this deprivation away from school.

VI

BASIS OF CLASS ACTION

1. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on their own behalf and on behalf of all others similarly situated.

2. The First Class of Plaintiffs, represented by plaintiffs KINNEY KINMON LAU, DAVID LEONG, JOAN YEE, PAULETTE CHEUNG, JUDY SUN, WAILY TOM, KAREN YEE, KAREN CHIU, and DAVID SUN, consists of all Chinese-speaking children attending the free public elementary and secondary schools of the San Francisco Unified School District, who need special instruction in English from defendants and are not receiving any such instruction.

3. The Second Class of Plaintiffs, represented by plaintiffs KIT LING LEE, STANLEY CHEUNG, SAI CHONG LEE, and SAI HO LEE, consists of all Chinese-speaking children attending the free public elementary and secondary schools of the San Francisco Unified School District, who are receiving some special instruction in English from defendants, but are taught only by non-Chinese speaking teachers.

4. Plaintiffs KINNEY KINMON LAU, DAVID LEONG, JOAN YEE, PAULETTE CHEUNG, JUDY SUN, WAILY TOM, KAREN YEE, KAREN CHIU, and DAVID SUN bring this action as a class action for the following reasons:

(a) The questions of law and fact are common to plaintiffs and the First Class of Plaintiffs they represent;

(b) The members of the First Class of Plaintiffs are so numerous as to make joinder impracticable;

(c) The claims of the plaintiffs are typical of the claims of all members of the First Class of Plaintiffs;

(d) The plaintiffs fairly and adequately represent the claims of all members of the First Class of Plaintiffs;

(e) The defendants are acting on grounds generally applicable to the entire First Class of Plaintiffs;

(f) The questions of law and fact common to the First Class of Plaintiffs predominate over any questions affecting individual members; and

(g) A class action will best provide a fair and efficient adjudication of the important issues at stake here.

5. Plaintiffs KIT LING LEE, STANLEY CHEUNG, SAI CHONG LEE, and SAI HO LEE bring this action as a class action for the following reasons:

(a) The questions of law and fact are common to plaintiffs and the Second Class of Plaintiffs they represent;

(b) The members of the Second Class of Plaintiffs are so numerous as to make joinder impracticable;

(c) The claims of the plaintiffs are typical of the claims of all members of the Second Class of Plaintiffs;

(d) The plaintiffs fairly and adequately represent the claims of all members of the Second Class of Plaintiffs;

(e) The defendants are acting on grounds generally applicable to the entire Second Class of Plaintiffs.

(f) The questions of law and fact common to the Second Class of Plaintiffs predominate over any questions affecting individual members; and

(g) A class action will best provide a fair and efficient adjudication of the important issues at stake here.

VII

FIRST CAUSE OF ACTION

As a FIRST CAUSE OF ACTION, plaintiffs reallege, as if fully set forth, the allegations set forth in parts I through VI of this complaint, and further allege:

1. Plaintiffs and all others similarly situated have a right to an education under the Fifth Amendment, the Ninth Amendment, and the Fourteenth Amendment of the Constitution of the United States, under Article IX, Section 5 of the Constitution of the State of California, and under California Education Code §§ 1051, 1054, 5011, 5012, 5015, 5652, and 12101.

2. By not providing members of the First Class of Plaintiffs with any special instruction in English, de-

fendants are depriving them of an education. By not providing members of the Second Class of Plaintiffs with special instruction taught by Chinese-speaking teachers in full-time, specially designed classes, defendants are depriving them of an education.

3. Such deprivation to members of both classes constitutes a clear violation of their rights to an education, in violation of the Fifth, Ninth, and Fourteenth Amendments of the Constitution of the United States, Article IX, Section 5 of the Constitution of the State of California, and California Education Code §§ 1051, 1054, 5011, 5012, 5015, 5652, and 12101.

VIII

SECOND CAUSE OF ACTION

As a SECOND CAUSE OF ACTION, plaintiffs reallege, as if fully set forth, the allegations set forth in parts I through VII of this complaint, and further allege:

1. In maintaining the San Francisco Unified School District, defendants are required—both by the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and by Article I, Sections 11 and 21, and Article IV, Section 25 of the Constitution of the State of California—to discharge their responsibility on substantially an equal basis to all children in the District.

2. As a result of defendants' actions, substantial disparities exist in the quality and extent of availability of educational opportunities in the San Francisco Unified School District. The educational opportunities made available to members of both classes are substantially inferior and unequal to the educational opportunities made available to the nearly 100,000 other students in the District.

3. Defendants' actions in denying plaintiffs and all others similarly situated equal educational opportunities are arbitrary and completely unrelated to the goal of providing all children with an education. In addition,

such actions cannot be justified in terms of educational needs or demands of plaintiffs or parents for such disparities.

4. By providing unequal educational opportunities defendants are invidiously discriminating against plaintiffs and members of both classes, in violation and deprivation of their rights to equal protection of the laws, as guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and by Article I, Sections 11 and 21, and by Article IV, Section 25 of the Constitution of the State of California.

IX

THIRD CAUSE OF ACTION

As a THIRD CAUSE OF ACTION, plaintiffs reallege, as if fully set forth, the allegations set forth in parts I through VIII of this complaint, and further allege:

1. As a result of defendants' actions, substantial disparities exist in the quality and extent of availability of educational opportunities among Chinese-speaking students in the District who need special help in English.

(a) The educational opportunities made available to members of the First Class of Plaintiffs—who receive no special instruction at all—are substantially inferior and unequal to the educational opportunities made available to those Chinese-speaking students receiving such instruction.

(b) The educational opportunities made available to members of the Second Class of Plaintiffs—who receive some special instruction taught only by non-Chinese speaking teachers—are substantially inferior and unequal to the educational opportunities made available to those Chinese-speaking students receiving such instruction from bilingual, Chinese-speaking teachers.

2. Defendants' actions in denying members of both classes equal educational opportunities are arbitrary and unjustifiable. Chinese-speaking students receiving equal educational opportunities are arbitrarily assigned to special classes taught by bilingual, Chinese-speaking teach-

ers, with their selection based neither on tests nor any other ascertainable standards.

3. By providing unequal educational opportunities, defendants are invidiously discriminating against plaintiffs and members of both classes, in violation and deprivation of their right to equal protection of the laws, as guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and by Article I, Sections 11 and 21, and by Article IV, Section 25 of the Constitution of the State of California.

X

FOURTH CAUSE OF ACTION

As a FOURTH CAUSE OF ACTION, plaintiffs reallege, as if fully set forth, the allegations set forth in parts I through IX of this complaint, and further allege:

1. Under the Civil Rights Act of 1964, the United States Congress established a federal right to be protected from discrimination under any program receiving federal monies.

2. Specifically, in Section 601 of the Civil Rights Act of 1964 (codified in 42 U.S.C. § 2000d), the United States Congress promulgated the following law:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

3. Pursuant to this Section of the Civil Rights Act, regulations were enacted providing that "each school system has an *affirmative duty* to take prompt and effective action to eliminate discrimination based on race . . . or national origin, and to correct the effects of past discrimination." 33 Fed. Reg. 4850 (March 23, 1968) (emphasis added).

4. Defendants are receiving federal financial assistance in general to administer and maintain educational pro-

grams and, in particular, to provide Chinese-speaking students special instruction in English taught by bilingual, Chinese-speaking teachers.

5. But, Chinese-speaking students who are members of the First Class of Plaintiffs are not receiving any such special instruction. Likewise, Chinese-speaking students who are members of the Second Class of Plaintiffs are receiving such instruction only from non-Chinese speaking teachers.

6. Therefore, members of both classes are being deprived of their right to an education because of their Chinese ethnicity and—for many—their recent immigration to the United States.

7. Such deprivation excludes members of both classes from participation in, denies them the benefits of, and subjects them to discrimination under educational programs receiving federal financial assistance, in violation of Section 601 of the Civil Rights Act of 1964 (codified in 42 U.S.C. § 2000d).

XI

FIFTH CAUSE OF ACTION

As a FIFTH CAUSE OF ACTION, plaintiffs reallege, as if fully set forth, the allegations set forth in parts I through X of this complaint, and further allege:

1. Plaintiffs allege, on information and belief, that defendants have received funds under Chapter 6.5 of the California Education Code to provide special educational programs for disadvantaged children. California Education Code §§ 6450 et seq.

2. In seeking Chapter 6.5 funds, defendants must submit a "comprehensive compensatory education plan." California Education Code § 6457. Such a plan must include:

- (a) Remedial programs for all disadvantaged children;
- (b) Preventive programs, focused on children between the ages of three and eight years, whose goal is

teaching the child to read, awakening the child's interest in learning, giving the child a sense of success in school achievement, preventing the child's alienation from the school, and preventing his possible early departure from school.

- (c) For disadvantaged children who do not speak English, the

programs *should include* early English language instruction, and the use of teachers, teachers' aides or volunteers *who are proficient in the child's primary language.* (Emphasis added).

3. The purpose of a "comprehensive compensatory education plan"—and of the programs under it—is to provide an education and special instruction in English for students like plaintiffs and all others similarly situated. And, as the statute states, such instruction must be given by teachers "proficient in the child's primary language."

4. Defendants have never submitted a "comprehensive compensatory education plan." The plans both drafted and submitted by defendants have never adequately dealt with the English-language deprivation of San Francisco Chinese-speaking students, a deprivation clearly demonstrated by the serious plight of the plaintiffs and all others similarly situated.

5. Therefore, in failing to submit such a "comprehensive compensatory education plan," defendants have violated the explicit requirements of California Education Code § 6457, to the severe detriment of the plaintiffs and all others similarly situated.

XII

SIXTH CAUSE OF ACTION

As a SIXTH CAUSE OF ACTION, the plaintiffs re-allege, as if fully set forth, the allegations set forth in parts I through XI of this complaint, and further allege:

1. Every person in California between the ages of six and 16 years must attend a full-time school. California Education Code § 12101. The purpose of such compulsory full-time education is to assure these individuals reach the minimum threshold of education necessary to function in this society.

2. To fulfill this purpose, the State of California has enunciated a policy that these students master and become competent in the English language. California Education Code § 71. Such a policy reflects the dominance of English in this society. For example, without competence in English, plaintiffs cannot vote (Article II, Section II of the Constitution of the State of California), cannot serve as jurors (California Code of Civil Procedure § 198(2)(3), and cannot comprehend the laws of this state or even legislative and judicial proceedings (Article IV, Section 24 of the Constitution of the State of California; California Code of Civil Procedure § 185).

3. Accordingly, to implement this policy, the State requires courses in English must be offered to all students in grades one through 12, providing them with "the skills of reading, listening, and speaking." California Education Code §§ 8551 (a) and 8571 (a). Also, programs have been enacted to guarantee that disadvantaged children—such as plaintiffs and all others similarly situated—attain these skills. E.g., California Education Code §§ 5766, 5770, 6060, 6450, 6499.200, 6750. Likewise, testing programs are required to evaluate the English competence of these students. E.g., California Education Code §§ 5779, 12820. Finally, to graduate from high school, students must possess basic skills in English. California Education Code § 8573.

4. By not providing members of both classes their rights to an education to learn English, defendants render irrational the compulsory education requirements of California Education Code § 12101.

5. Furthermore, by not providing members of both classes with special instruction in English taught by bilingual teachers, defendants are violating and depriving them of rights guaranteed by the explicit mandates of Article II, Section 11, and Article IV, Section 24, of

the Constitution of the State of California, of California Education Code §§ 71, 5766, 5770, 5779, 6060, 6450, 6499.200, 6750, 8551 (a), 8571 (a), 8573, 12820, and of California Code of Civil Procedure §§ 185, 198 (2) (3).

XIII

SEVENTH CAUSE OF ACTION

As a SEVENTH CAUSE OF ACTION, the plaintiffs reallege, as if fully set forth, the allegations set forth in parts I through XII of this complaint, and further allege:

1. It is the policy of the State of California that school districts, including the San Francisco Unified School District, "develop programs that will best fit the needs and interests of the pupils." California Education Code § 7502.
2. The State of California has further stated that non-English speaking children will master English most effectively and swiftly through programs of bilingual instruction. California Education Code §§ 71, 5766, 6457, 13187.6. In fact, that California State Legislature explicitly advocates "bilingual instruction in order [that non-English speaking students] develop a greater proficiency in English in accordance with the general policy specified in Section 71 of the Education Code." California Education Code § 5766 (3).
3. By not providing members of both classes with special instruction taught by bilingual teachers, defendants are both violating the explicit requirements of California Education Code § 7502 and depriving plaintiffs and all others similarly situated of bilingual instruction in English, guaranteed by California Education Code §§ 71, 5766, 6457, 13187.6.

XIV

BASIS FOR INJUNCTIVE RELIEF

1. Plaintiff and members of both classes they represent will suffer irreparable injury if immediate action is

not taken to guarantee them their rights to an education. Such a fundamental right to education is guaranteed by the Constitution of the United States, the Constitution of the State of California, and laws enacted by the California State Legislature. Unless plaintiffs receive their rights, they will continue to suffer the immediate and irreparable harm of no education and unequal educational opportunities and, hence, will be unable to function effectively in both the classroom and society.

2. Plaintiffs and members of both classes they represent will also suffer irreparable injury unless this Court takes immediate and prompt action. Preparation by defendants for special instruction in English taught by bilingual, Chinese-speaking teachers may take some time to develop and implement. Before plaintiffs and members of both classes receive their rights, personnel may have to be hired, space and special materials acquired, and testing of all children performed.

3. No previous application for the relief sought herein has been made to this or any other Court.

4. No adequate remedy at law is available to plaintiffs or members of both classes they represent.

WHEREFORE, plaintiffs respectfully pray, on behalf of themselves and on behalf of all members of both the First Class of Plaintiffs and Second Class of Plaintiffs, that this Court:

1. Issue preliminary and permanent injunctions enjoining defendants from refusing to provide plaintiffs and all others similarly situated with an education and with equal educational opportunities, in violation of the Constitution of the United States, the Constitution of the State of California, and laws enacted by the California State Legislature.

2. Issue preliminary and permanent injunctions enjoining defendants from refusing to provide plaintiffs and all others similarly situated with special instruction in English, taught by bilingual teachers, without which plaintiffs and all others similarly situated will continue to be denied an education and denied educational opportunities equal to students whose native language is English.

3. Issue preliminary and permanent injunctions requiring defendants to institute a testing program—with-

in a reasonable time not to exceed 30 days—to assess the capabilities of all Chinese-speaking students in all elementary and secondary grades to speak, read, and write the English language, in order to rationally assign students to special classes in English taught by bilingual teachers.

4. Issue preliminary and permanent injunctions requiring defendants to implement a program—within a reasonable time not to exceed September 1, 1970—of special instruction in English for Chinese-speaking students, taught by bilingual teachers, in order to provide plaintiffs and all others similarly situated with their rights to an education and to equal educational opportunities.

5. Enter a declaratory judgment declaring defendants' failure to provide plaintiffs and all others similarly situated with special instruction in English, taught by bilingual teachers, is in violation of the Constitution of the United States, the Constitution of the State of California, and laws enacted by the California State Legislature.

6. Order such other and further relief as the Court deems appropriate.

Dated: March 23, 1970.

WONG, BERGGREN & SIEDMAN
EDWARD H. STEINMAN

By /s/ Edward H. Steinman
Attorney for Plaintiffs

[Affidavit of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-70 627 LHB

[Title Omitted]

INTERROGATORIES PROPOUNDED BY PLAINTIFFS TO DEFENDANTS ALAN H. NICHOLS, DR. LAUREL E. GLASS, DR. ZURETTI L. GOOSBY, EDWARD KEMMITT, MRS. ERNEST R. LILIENTHAL, HOWARD N. NEMEROVSKI, DR. DAVID J. SANCHEZ, JR., ROBERT E. JENKINS—Filed April 17,
1970

TO: DEFENDANTS ALAN H. NICHOLS, President, DR. LAUREL E. GLASS, DR. ZURETTI L. GOOSBY, EDWARD KEMMITT, MRS. ERNEST R. LILIENTHAL, HOWARD N. NEMEROVSKI, DR. DAVID J. SANCHEZ, JR., in their official capacities as members of the Board of Education of the San Francisco Unified School District, to defendant ROBERT E. JENKINS, Superintendent of the San Francisco Unified School District, and to IRVING BREYER, their attorney of record:

Plaintiffs request that defendants, and each of them, answer the following interrogatories, separately and fully, in writing and under oath, pursuant to Rule 33 of the Federal Rules of Civil Procedure and all applicable sections of said Rules. The answers should be signed by persons making them and must be served on plaintiffs within 15 days after service of these interrogatories.

In answering these interrogatories, furnish all information which is available to you, including information in the possession of your attorney and not merely such information known of your knowledge. Furthermore, for every question, identify the source material and/or materials upon which your answer is based.

If you cannot answer the following interrogatories in full, after exercising due diligence to secure the information called for, so state, and answer the questions to the extent possible, specifying your inability to answer

the remaining portions and stating whatever information or knowledge you have concerning the unanswered portions.

In addition, for Interrogatories No. 1, 2, 3, 4, 5, 6, and 7—which includes all the sub-interrogatories asked in each of the aforementioned interrogatories—please provide the requested information for the school years 1967-68, 1968-69, and 1969-70.

1. What is the total number of students enrolled in regular classes administered by the Board of Education of the San Francisco Unified School District? [For purposes of this interrogatory and every subsequent interrogatory, the terms "regular classes" and "students" refer only to daytime programs administered by the Board of Education of the San Francisco Unified School District. Hence, adult education programs, evening programs, summer programs, and the like are not to be included within the scope of your answers.]

a. How many of these students are of Chinese ethnicity?

2. State the name of each school administered by the Board of Education of the San Francisco Unified School District [hereinafter referred to as "the School District"].

- a. State the number of Students enrolled in classes at each of these schools.
- b. State the number of students of Chinese ethnicity enrolled in classes at each of these schools.
- c. State the number of students of Chinese ethnicity enrolled in each grade (from grade kindergarten to grade 12) at each of these schools.

3. Concerning your answer to Interrogatory No. 2b, how many of these students of Chinese ethnicity have deficiencies in the English language [for purposes of these interrogatories, "deficiencies in the English language" shall mean "need special instruction in English," which is the standard utilized by the School District]?

- a. From what information, surveys, tests, etc., is your answer to Interrogatory No. 3 based?

1. When was such information, survey, test, etc. taken?
 2. How was such information, survey, test, etc., taken? Include in your answer the methods and criteria utilized in taking such information, surveys, tests, etc.
- b. Are there any written documents reflecting the results of the information, surveys, tests, etc. from which your answer to Interrogatory No. 3 is derived?
1. If there are such documents, please attach a copy of them to your answers to these interrogatories.
4. Give a school-by-school and grade-by-grade breakdown of those students of Chinese ethnicity who need special instruction in English.
- a. Are there any written documents reflecting the information, surveys, tests, etc., from which your answer to Interrogatory No. 4 is derived?
1. If there are such documents, please attach a copy of them to your answer to these interrogatories.
5. Describe in detail what special instruction in English is being given to those students of Chinese ethnicity listed in your answer to Interrogatory No. 3. Please include in your answer the following:
- a. How many students of Chinese ethnicity needing special instruction in English actually receive any instruction?
 - b. Concerning your answer to Interrogatory No. 5a, please give a school-by-school and grade-by-grade breakdown of those students of Chinese ethnicity who receive any special instruction in English.
 - c. State how many hours a day each of those students listed in your answer to Interrogatory No. 5a receive special instruction in English.

- d. State how many teachers provide such special instruction and how many of these teachers are fluent in both English and Chinese.
 - e. Explain what "special instruction in English" actually constitutes; i.e., describe the methods utilized, the goals sought, and the achievements realized.
 - f. Are there any written documents reflecting the information, surveys, tests, etc., from which your answers to Interrogatories No. 5 through 5e are derived?
 - 1. If there are such documents, please attach a copy of them to your answers to these interrogatories.
6. What is the role of the Chinese Bilingual Education Program of the School District?
- a. How many Chinese students needing special instruction in English does this Program service?
 - b. How many classes are supervised by this Program?
 - 1. How many hours a day do these classes meet?
 - c. How many teachers are under the supervision of the Chinese Bilingual Education Program?
 - 1. How many of these teachers are bilingual (i.e., how many are fluent in both Chinese and English)?
 - d. Are there any written documents reflecting the information, surveys, tests, etc., from which your answers to Interrogatories No. 6 through No. 6c are derived?
 - 1. If there are such documents, please attach a copy of them to your answers to these interrogatories.
7. What is the school budget under which the School District operates?
- a. How much of this budget is spent for special instruction in English for students of Chinese ethnicity?

1. Please break down your answer to Interrogatory No. 7a into the following parts:
 - (a) How much is spent for teacher salaries?
 - (b) How much is spent on materials and textbooks?
 - (c) How much is spent on curriculum development?
 - (d) How much is spent for summer programs providing special instruction in English?
- b. From what sources do these monies spent on special instruction in English for students of Chinese ethnicity come?
- c. Has the School District applied to the United States government and State of California for funds for special instruction in English for students of Chinese ethnicity?
 1. If so, describe in detail when these applications were made, to whom they were made, for what purposes the funds were sought, and what action was taken by the respective governmental agencies concerning the School District's applications.
 2. Please attach copies of these applications and the written responses of the respective governmental agencies to your answers to these interrogatories.
- d. If the School District has either not applied to governmental agencies for such funds or has applied only on a limited and narrow basis, please explain the reasons behind the School District's actions and/or inactions.
 1. Has the School District been unable to meet the eligibility requirements to qualify for funding under these federal and state governmental programs? If so, explain in detail the problems and difficulties posed by such eligibility requirements.

- e. Are there any written documents reflecting the information, surveys, tests, etc., from which your answers to interrogatories No. 7 through No. 7d are derived?
1. If there are such documents, please attach a copy of them to your answers to these interrogatories.
8. For the 1970-71 school year, describe what you anticipate will be the scope of programs providing special instruction in English to students of Chinese ethnicity. Include in your answer the following:
- a. How many students of Chinese ethnicity will be given special instruction in English?
 - b. How many teachers will give such instruction?
 1. How many of these teachers will be bilingual (fluent in both Chinese and English)?
 - c. How many classes will be devoted to special instruction in English for students of Chinese ethnicity?
 1. How many hours a day will each of these classes meet?
 2. What teaching methods will be employed in these classes?
 3. Will any classes be taught via bilingual instruction? If so, explain in detail how many classes will be taught bilingually, what teaching methods will be employed, and what materials and textbooks will be utilized.
 - d. How much money will be appropriated by the School District for special instruction in English for students of Chinese ethnicity?
 1. From what sources will funds for special instruction in English for students of Chinese ethnicity come?
 2. How much money has been requested by the Chinese Bilingual Education Department?

- e. Are there any written documents reflecting the information, surveys, tests, etc., from which your answers to Interrogatories No. 8 through No. 8d are derived?
1. If there are such documents, please attach a copy of them to your answers to these interrogatories.
9. Describe in detail the activities and goals of the School District's Chinese Education Center. Include within your answer the following information:
- a. How many students have been enrolled in its classes?
 - b. How many students have been referred to regular school classes?
 - c. How many students, who have needed the services of the Center, have been refused such help because of budget and space limitations?
 - d. How many teachers are employed by the Center?
 1. How many of these teachers are bilingual?
- e. Describe the methods utilized in teaching the students enrolled at the Center.
1. Is bilingual instruction utilized? If not, explain why.
- f. Describe the scope and size of the program at the Center for the 1970-71 school year.
- g. Are there any written documents reflecting the information, surveys, tests, etc., from which your answers to Interrogatories No. 9 through No. 9f are derived?
1. If there are such documents, please attach a copy of them to your answers to these interrogatories.
10. What efforts has the School District made in recruiting and hiring bilingual teachers proficient in both English and Chinese?

- a. How many such bilingual teachers proficient in both English and Chinese have been hired since the California State Legislature passed the enabling legislation of Section 13187.6 of the California Education Code?
 1. How many bilingual teachers proficient in both English and Chinese have applied for teaching positions with the School District during the following years: 1966, 1967, 1968, 1969, 1970?
11. Of those students of Chinese ethnicity needing special instruction in English (see your answer to Interrogatory No. 3), how many of them are:
 - a. American-born.
 - b. American citizens.
 - c. Immigrants who arrived in this country prior to September of 1968.
 - d. Immigrants who arrived in this country between September of 1968 and September of 1969.
 - e. Immigrants who arrived in this country since September of 1969.
12. If you do not have exact figures to provide answers to Interrogatory No. 11, please give estimates in percentage terms for the questions asked in Interrogatory No. 11.
13. Of those students of Chinese ethnicity receiving special instruction in English (see your answer to Interrogatory No. 5a), how many of them are:
 - a. American-born.
 - b. American citizens.
 - c. Immigrants who arrived in this country prior to September of 1968.
 - d. Immigrants who arrived in this country between September of 1968 and September of 1969.
 - e. Immigrants who arrived in this country since September of 1969.
14. If you do not have exact figures to provide answers to Interrogatory No. 13, please give estimates in

percentage terms for the questions asked in Interrogatory No. 13.

15. Are there any written documents reflecting the information, surveys, tests, etc., from which your answers to Interrogatories No. 11 through No. 14 are derived?

a. If there are such documents, please attach a copy of them to your answers to these interrogatories.

16. Describe in detail the scope and activities of the School District's Spanish Bilingual Program. Include in your answer the following:

a. How many Spanish-speaking students in the School District are deficient in English (i.e., need special instruction in English)?

b. How many of these Spanish-speaking students are receiving special instruction in English?

c. How many teachers are employed to provide such special instruction?

1. How many of these teachers are bilingual, being proficient in both Spanish and English?

d. What teaching methods are employed in providing special instruction in English to Spanish-speaking students?

1. Are these students taught via bilingual instruction?

2. If Spanish-speaking students are taught primarily via bilingual instruction, why are not Chinese-speaking students taught primarily via bilingual instruction?

e. Are there any documents reflecting the information, surveys, tests, etc., from which your answers to Interrogatories No. 16 through No. 16d are derived?

1. If there are such documents, please attach a copy of them to your answers to these interrogatories.

17. Are students of Chinese ethnicity involved in the School District's "Project Read"?

- a. If so, state how many students of Chinese ethnicity are involved in the program and describe what kind of educational benefit they are receiving.
- b. Are students who do not speak English tested to measure the effectiveness of reading programs such as "Project Read"?
 1. If not, how is the reading proficiency of these non-English-speaking students measured?

Each of the Interrogatories Nos. 1 through 17—including all sub-interrogatories asked within each interrogatory—is deemed to be a continuing interrogatory, and plaintiffs make demand upon defendants that in the event that at any later date defendants obtain any additional facts, or obtain or make any assumptions or reach any conclusions, opinions, or contentions that are different from those set forth in their answers to these interrogatories, that in such case defendants shall amend their answers to said interrogatories promptly and sufficiently prior to any hearing to fully set forth such different facts, assumptions, conclusions, opinions, or contentions.

Furthermore, if defendants do not attach copies of all the writings and documents requested in Interrogatories Nos. 3b, 4a, 5f, 6d, 7c2, 7e, 8e, 15, 16e, please provide the following information concerning each and every one of the above-mentioned documents:

- a. A clear, concise, and detailed description of the documents;
- b. A description of the nature and extent of the documents;
- c. What individual or individuals have custody of the documents;
- d. Describe the condition and state of the document in a clear, concise, and detailed manner; and
- e. Indicate the exact location of this document including, but not limited to, the following facts:
 - (1) The address of the building in which the documents are located;
 - (2) The room or rooms in which the documents are located; and

(3) The actual container of the document, such as
a safe, filing cabinet, or any other container.

ated: April 17, 1970.

WONG, BERGGREN & SIEDMAN
EDWARD H. STEINMAN

By /s/ Edward H. Steinman
Attorneys for Plaintiffs

[Affidavit of Service Omitted]

[Handwritten signature]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-70 627 LHB

[Title Omitted]

AFFIDAVIT IN OPPOSITION TO MOTION FOR PRELIMINARY
INJUNCTION AND IN SUPPORT OF MOTION TO DISMISS

STATE OF CALIFORNIA)

) 88.

CITY AND COUNTY OF SAN FRANCISCO)

I, ISADORE PIVNICK, being first duly sworn, state that I am presently employed by the San Francisco Unified School District and am serving in the capacity of Assistant Superintendent, Innovative Planning. I have been employed by the School District since August, 1947. The San Francisco Unified School District has been involved in special programs for non-English speaking Chinese since 1965 when Title I Elementary and Secondary Education Act Funds were made available for selected poverty stricken youth in San Francisco. At that time fifty-six (56) schools were identified as being eligible for Title I funds.

When this District's application was submitted to the State of California for funding we were informed that insufficient money was available to provide the type of service involved to that number of children. The number of schools was then reduced to twenty-six (26) and no schools in the Chinatown area were listed among these twenty-six (26) designated for special assistance. The San Francisco Economic Opportunity Council requested that consideration be given toward providing services for the Commodore Stockton School and after several meetings with the State Office of Compensatory Education it was agreed that Commodore Stockton School should be included in the program on the basis of language problems of many of the students at the school.

Last year the State Board of Education stated that schools receiving funds under Title I must provide for saturation services in a comprehensive program.

In order to identify children who should receive services, schools were first listed on the basis of AFDC (Aid for Families with Dependent Children) recipients or the 1960 census poverty index. After schools were identified as being eligible the next consideration was communication skills and other test scores. It was on this basis, the need for assistance in learning English, that it was possible to qualify Commodore Stockton School as one of ten schools to receive comprehensive help. This final ten schools represented a reduction from the twenty-six previously approved by the State.

The San Francisco Unified School District is one of two cities awarded funds under Title VII of the Elementary Secondary Education Act for institution of a Chinese bilingual program and has been granted the sum of \$51,500.00 for such a program which is now operative. In addition to this program the School District has invested its own money in a Chinese Education Center which provides services for a limited number of non-English speaking youngsters. Its services are also comprehensive in nature. The School District further provides for the teaching of English to Chinese youngsters living outside of the Chinatown-North Beach area with a functioning program supervised by Mr. Wellington Chew. The term "comprehensive program or plan" is used as part of the State plan for utilization of Title I money. It operates not on the basis of inclusion of all children within a designated School District, but rather for the inclusion of all children attending a designated and approved school. For qualification of a school State and Federal guidelines require that poverty areas be identified on the basis of the criteria of guidelines which I have previously set forth. It is at this point, when a school has been designated, that a comprehensive program is developed to provide services in academic areas as well as ethnic studies and health services.

/s/ Isadore Pivnick

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-70 627 LHB

[Title Omitted]

AFFIDAVIT IN OPPOSITION TO MOTION FOR PRELIMINARY
INJUNCTION AND IN SUPPORT OF MOTION TO DISMISS

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

I, WELLINGTON CHEW, being first duly sworn, state that I am presently employed by the San Francisco Unified School District and am serving in the capacity of Supervisor of the Chinese Bilingual Program. I have been employed by the School District for twenty years and have served in my present capacity since the inception of this program, in 1967. Prior to that time I taught and was a counselor at Franscisco Jr. High School as well as serving in several other capacities for the School District.

The San Francisco Unified School District presently has in operation a Chinese Bilingual Pilot Program funded by \$51,000 received under Title VII of the Elementary and Secondary Education Act and it is hoped and anticipated that it will receive at least \$151,000 for continuation and enlargement of the program during the ensuing year. The San Francisco Unified School District pays the salary of the teacher conducting this program which is done bilingually.

Additionally, the San Francisco Unified School District has set up a Chinese Education Center with approximately \$100,000 of this District's funds, wherein one social studies class is taught bilingually and the remainder of the program is taught by ESL (English as a Second Language). This Center screens incoming students giving them some basic English before they are placed in the San Francisco schools. Furthermore, programs are being conducted in

numerous other schools throughout the City wherein the ESL method is employed to improve the English comprehension of Chinese students (Exhibit A attached). Also attached (Exhibit B) is an outline of the budget for the Chinese Bilingual Education Program from 1966 to 1970, including proposals for 1970-71.

The Chinese Bilingual Program, presently funded with \$50,000 of Federal money, is a pilot program created with the purpose of evaluating student progress and comprehension through the employment of Bilingual Education for non-English speaking students.

/s/ Wellington Chew

[Declaration of Service Omitted]

EXHIBIT A

**SAN FRANCISCO UNIFIED SCHOOL DISTRICT
OFFICE OF SUPERINTENDENT**

1855 VAN NESS AVENUE
SAN FRANCISCO, CALIFORNIA 94102
Telephone: (415) 863-4680

**CHINESE BILINGUAL EDUCATION
STUDENTS IN PROGRAM—1970**

February 26, 1970

ELEMENTARY (Chinatown-North Beach)	Number of teachers	Students	Grade	Level	F = full time	P = part time	Funding **
Chinese Education Center	3	71			3-6		F
Commodore Stockton	1	25			1		F
"	2	80			4-6		F
"	2	80			8-6		F
Garfield	3	45			K-6		CBE
Hancock	2	26			8-6		CBE
Jean Parker	1	15			8-6		CBE
Redding	1	15			K-6		CBE
Sarah B. Cooper	1	15			K-3		CBE
Spring Valley	2	30			2-6		CBE

Number of teachers	Students	Grade Level	F=full time P=part time	Funding **
			4-5 K-6	
Spring Valley	1	15	F	Comp.
Washington Irving (Richmond District)	2	30	F	CBE
Alamo				
Lafayette	1	35	K-6	CBE
Argonne				CBE
Frank McCoppin	1	35	K-6	CBE
JUNIOR HIGH *				
Francisco	9	148	7-9	CBE=1 SFUSD=8
Marina	8	136	7-9	CBE=3 SFUSD=5
Presidio	2	43	7-9	SFUSD
Roosevelt	1	20	7-9	SFUSD
SENIOR HIGH *				
Galileo	2	43	10-12	SFUSD
Samuel Gompers	1	20	9-12	CBE
" "	6	143	9-12	SFUSD
George Washington	2	26	9-12	SFUSD

* For junior, senior high teaching positions

** Budget: CBE = Chinese Bilingual Education
CEC = Chinese Education Center

EXHIBIT B

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
OFFICE OF SUPERINTENDENT135 VAN NESS AVENUE
SAN FRANCISCO, CALIFORNIA 94102
Telephone: (415) 863-4680

CHINESE BILINGUAL EDUCATION BUDGET 1966-1970

	1966-67	1967-68	1968-69	1969-70	1970-71
Chinese Bilingual Education	0	\$88,016	\$280,469	\$280,469	\$ 656,248
ESEA Title VII	0	0	0	51,500	50,000
Chinese Education Center	0	0	0	100,000	385,766
TOTAL	0	\$88,016	\$280,469	\$431,969	\$1,092,009

TEACHERS

ELEMENTARY

Chinese Education Center	0	0	0	8	11
Chinese Bilingual Education	0	15	15	17	21
SFUSD	2	2	2	2	2
Compensatory	0	0	1	1	1
ESEA VII	0	0	0	1	1
	2	17	18	29	36

JUNIOR HIGH

Chinese Bilingual Education	0	4	4	4	8
SFUSD	11	11	11	13	18
	11	15	15	17	21

SENIOR HIGH

Chinese Bilingual Education	0	0	1	1	2
SFUSD	6	6	6	7	7
	6	6	7	8	9

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-70 627 LHB

[Title Omitted]

AFFIDAVIT IN OPPOSITION TO MOTION FOR PRELIMINARY
INJUNCTION AND IN SUPPORT OF MOTION TO DISMISS

STATE OF CALIFORNIA

)

) ss.

CITY AND COUNTY OF SAN FRANCISCO)

I YVON JOHNSON, being first duly sworn, state that I am the Acting Director of Research and Program Evaluation for the San Francisco Unified District and I have been employed by this School District for nineteen years. For four and one-half years I served as Assistant Principal at Francisco Jr. High School which has a large number of Chinese students and by virtue of my one and one-half years of study of Cantonese I often conversed with students and children in Chinese. In my service within the School District I have noted that there is a strong divergence of views among many teachers as to whether Bilingual Education or ESL (English as a Second Language) is the better method for teaching non-English speaking students the English language. Bilingual Education combines both the English language and the student's native language toward the goal of learning to speak and comprehend English while preserving the heritage, language comprehension and cultural background of the pupil's native language. English as a Second Language provides an intensified course in learning English and does not require that the teacher have a comprehension of the child's native language. Generally speaking, ESL is a speedier method of learning English as this language is emphasized and concentrated upon by the learning student.

Furthermore, there is support for the theory that placing a child who does not speak English in an involvement where he is not constantly in contact with his native language will speed and encourage his learning of the English language.

/s/ Yvon Johnson

[Declaration of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-70 627 LHB

[Title Omitted]

STIPULATION—Filed May 12, 1970

IT IS HEREBY STIPULATED between EDWARD H. STEINMAN, attorney for the plaintiffs, and RAYMOND D. WILLIAMSON, JR., attorney for the defendants, that the following figures are true and accurate, and may be admitted without objection into evidence at this hearing for a preliminary injunction:

1. There are—at present—2,856 Chinese-speaking students in the San Francisco Unified School District who need special instruction in English. San Francisco Unified School District, December of 1969 survey conducted by Chinese Bilingual Education Program.

a. Of these 2,856 Chinese-speaking students who need special help in English, 1,066 receive some help. Defendants' Affidavit of Wellington Chew, p. 3.

b. Of the 1,066 Chinese-speaking students receiving help, 633 receive such help on a part-time basis and 433 on a full-time basis. *Ibid.*

2. In November of 1967, there were 2,455 Chinese-speaking students in the San Francisco Unified School District who need special instruction in English. Dr. Robert E. Jenkins, "Bilingual Education in the San Francisco Unified School District," p. 2 (November 21, 1967). Of these 2,455 Chinese-speaking students needing special help, 473 received such help. Dr. Robert E. Jenkins, "Chinese Bilingual Education: A Preliminary Report," p. 8 (1968).

3. According to the annual reports of the Human Relations Division of the San Francisco Unified School District, the following represents the number of Chinese

students in the San Francisco Unified School District in the years 1966-1969:

15,642 Chinese students—October, 1966
15,559 Chinese students—October, 1967
16,091 Chinese students—September, 1968
16,574 Chinese students—September, 1969

Dated: May 12, 1970.

WONG, BERGGREN & SIEDMAN
EDWARD H. STEINMAN

By /s/ Edward H. Steinman
Attorneys for Plaintiffs
THOMAS M. O'CONNOR
RAYMOND D. WILLIAMSON, JR.

By /s/ Raymond D. Williamson, Jr.
Attorneys for Defendants

APPROVED AND SO ORDERED this date: May 19,
1970.

/s/ Lloyd H. Burke
United States District Judge
Mailed Copies—5/12/1970

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-70 627 LHB

[Title Omitted]

ANSWER TO COMPLAINT FOR INJUNCTION AND
DECLARATORY RELIEF—Filed May 26, 1970

Come now the defendants ALAN H. NICHOLS, DR. LAUREL E. GLASS, DR. ZURETTI L. GOOSBY, EDWARD KEMMITT, MRS. ERNEST R. LILIENTHAL, HOWARD N. NEMEROVSKI, DR. DAVID J. SANCHEZ, JR., DR. ROBERT E. JENKINS, MRS. DIANNE FEINSTEIN, JOHN J. BARBAGELATA, ROGER BOAS, JOHN A. ERTOLA, TERRY A. FRANCOIS, ROBERT E. GONZALES, JAMES MAILLIARD, ROBERT H. MENDELSON, RONALD PELOSI, PETER TAMARAS and MRS. DOROTHY VON BEROLDINGEN and answering the complaint of plaintiffs on file herein, admit, deny and allege as follows:

I

Answering the allegations of plaintiffs' preliminary statement defendants admit that a recent survey of teachers in the San Francisco Unified School District revealed that approximately 2,850 Chinese speaking students need special instructions in English and of these, approximately 1,050 do receive some formal instruction in the English language; and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

II

Denies each and every, all and singular, generally and specifically, the allegations contained in paragraphs II and VI of said complaint.

III

Answering the allegations of paragraph III of said complaint, defendants admit that the named plaintiffs are students presently enrolled in the San Francisco Unified School District and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

IV

Answering the allegations of paragraph V of said complaint, defendants admit that English is the basic language in all public schools in the City and County of San Francisco and that this school district is required by law to maintain classes in grades 1 through 12 and does so; and further admits that children between the ages of 6 and 16 are required by law to attend school; and further admits that the California state legislature in the exercise of its discretion has enacted certain special programs designed to aid special needs of students and has provided funds for some of those programs; and further admit that a teacher survey indicated that approximately 2,850 Chinese speaking students needed special help in English and of these, approximately 1,050 are receiving formal instruction in English and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

V

Answering the allegations of paragraph VII entitled "First Cause of Action" defendants make the same admissions, denials and allegations as to the paragraphs incorporated by reference in said paragraph VII as they have heretofore made when answering said paragraphs, and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

VI

Answering the allegations of paragraph VIII of said complaint entitled "Second Cause of Action" defendants make the same admissions, denials and allegations as to the paragraphs incorporated by reference in said paragraph VIII as they have heretofore made when answering said paragraphs; and further admit that equal educational opportunities are offered to all students in the San Francisco Unified School District and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

VII

Answering the allegations of paragraph IX of said complaint entitled "Third Cause of Action" defendants make the same admissions, denials and allegations as to the paragraphs incorporated by reference in said paragraph IX as they have heretofore made when answering said paragraphs, and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

VIII

Answering the allegations of paragraph X of said complaint entitled "Fourth Cause of Action" defendants make the same admissions, denials and allegations as to the paragraphs incorporated by reference in said paragraph X as they have heretofore made when answering said paragraphs, and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

IX

Answering the allegations of paragraph XI of said complaint entitled "Fifth Cause of Action" defendants make the same admissions, denials and allegations as to

the paragraphs incorporated by reference in said paragraph XI as they have heretofore made when answering said paragraphs; defendants further admit that a proper "comprehensive compensatory education plan" has been prepared and submitted to the State of California by defendants and defendants are receiving funding for various programs approved by the State in connection with said plan and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

X

Answering the allegations of paragraph XII of said complaint entitled "Sixth Cause of Action" defendants make the same admissions, denials and allegations as to the paragraphs incorporated by reference in said paragraph XII as they have heretofore made when answering said paragraphs; defendants further acknowledge that California law requires school attendance of children between the ages of 6 and 16 years; defendants further admit the existence of the State Code sections referred to by plaintiffs while denying plaintiffs' interpretation of said sections and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

XI

Answering the allegations of paragraph XIII of said complaint entitled "Seventh Cause of Action" defendants make the same admissions, denials and allegations as to the paragraphs incorporated by reference in said paragraph XIII as they have heretofore made when answering said paragraphs and except as herein expressly admitted, deny each and every, all and singular, generally and specifically, the allegations therein contained.

XII

Answering the allegations of paragraph XIV of said complaint defendants deny each and every, all and singular, generally and specifically, said allegations.

AS AND FOR A FURTHER, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE COMPLAINT defendants submit that bilingual education is not a right of any student under either California or Federal law and is merely one of several acceptable methods designed to benefit students in learning the English language.

AS AND FOR A SECOND, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE COMPLAINT defendants allege that plaintiffs fail to state facts sufficient to state a cause of action either for injunction or for declaratory relief under any federal or state statute and thus this Court has no jurisdiction in this matter.

AS AND FOR A THIRD, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE COMPLAINT defendants allege that plaintiff fail to state a cause of action for class relief in that insufficient facts are shown to establish a class.

AS AND FOR A FOURTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE COMPLAINT the defendant members of the Board of Supervisors allege that by law they are to accept the budget presented them by the Board of Education and thus are not proper parties to this action.

AS AND FOR A FIFTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE COMPLAINT the defendant members of the Board of Education and the defendant Superintendent of Schools allege that they are within the proper exercise of their discretion in determining budgetary needs of the San Francisco Unified School District and thus no cause of action is stated for which this Court should grant relief against said defendants.

AS AND FOR A SIXTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE COM-

PLAINT defendants allege that plaintiffs fail to state facts sufficient to constitute a right which would warrant the exercise of jurisdiction by a Federal District Court.

WHEREFORE, defendants pray that plaintiffs take nothing by their complaint on file herein, that said defendants have judgment for their costs of suit herein incurred and for such other and further relief as to the Court may seem proper.

Dated: May 25, 1970.

/s/ Thomas M. O'Connor
City Attorney
/s/ Raymond D. Williamson, Jr.
Deputy City Attorney
Attorneys for Defendants

Of Counsel:

/s/ Irving G. Breyer

[Declaration of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-70 627 LHB

[Title Omitted]

AFFIDAVIT IN OPPOSITION TO MOTION FOR PRELIMINARY
INJUNCTION AND IN SUPPORT OF MOTION TO DISMISS
—FILED MAY 26, 1970

STATE OF CALIFORNIA)

)
ss.

CITY AND COUNTY OF SAN FRANCISCO)

I, EDWARD D. GOLDMAN, being first duly sworn, state that I am employed by the San Francisco Unified School District and have been for 36 years. I am presently serving in the capacity of Associate Superintendent, Instruction.

The School District is aware of the difficulties encountered by many of the students of Chinese ancestry who have an inadequate background in English. In our efforts to better the situation, the District has appropriated for the school year 1969-70, approximately \$1 million in programs for Chinese and Spanish students in the area of English as a second language and bilingual education. It was only recently that an amendment to the Education Code (Section 71) enabled us to use the bilingual method of teaching.

For the school year 1969-70, the Board of Education appropriated over \$100,000 in order to establish a Chinese Education Center. This Center is admittedly just the beginning of fulfilling the total needs of the Chinese community. It is our eventual hope that a program from kindergarten through adult education will be offered in a center in Chinatown. However, recognizing the urgent needs for this kind of program, the District did appropriate at least an initial sum in order to establish a center.

The District has also appointed a supervisor for the Chinese and a supervisor for the Spanish ESL/Bilingual programs. At the high school level, Samuel Gompers has as its major purpose the teaching of immigrant students. In the adult Division of the Unified School District (which is now under the junior college), English for the foreign born comprises 43 per cent of its total budget.

A substantial increase has been requested in the funding of the Chinese bilingual programs for 1970-71 in our continuing efforts to expand and improve the program. As the budget is not yet finalized we cannot say what actual increase will be forthcoming.

Since bilingual education has been allowed by the change in the provisions of the California Education Code, San Francisco has proceeded diligently toward implementing and improving the programs in this area and will continue to do so. On May 19, 1970, the Board of Education passed a resolution establishing the position of Director, ESL/Bilingual Education effective as of July 1, 1970, in further effort to broaden the scope of these programs.

/s/ Edward D. Goldman

Subscribed and sworn to before me this 26th day of May 1970.

/s/ [Illegible]
Notary Public

[Declaration of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-70 627 LHB

ANSWERS TO INTERROGATORIES—FILED MAY 26, 1970

Comes now IRVING G. BREYER, Legal Adviser to the San Francisco Board of Education, and, being duly sworn, answers plaintiff's interrogatories as follows based upon information and belief:

1. Total students, K through 12 as of September 17, 1969: 90,790.

a) Total Chinese students: 13,225 (14.6%).

2. See Exhibit A, "Pupil Enrollment in the San Francisco Public Schools," attached.

3. 1967-1968 1,549.

1968-1969 No survey taken.

1969-1970 2,856.

a) 1) District wide survey taken November, 1967 and December, 1969.

2) Survey made of all schools. Need for special English instruction based on teacher opinion.

b) See Exhibits B, "Bilingual Education in the San Francisco Unified School District," and C, "Teacher Opinion Survey of Chinese Students Needing Special Help in English," attached.

5. a) 1,066.

b) See Exhibit D, "Chinese Bilingual Education—Students in Program, 1970," attached.

c) Full time - 6 hours per day.

Part time - 1 hour per day.

d) 59, - 21.

e) English patterns, syntax and lexicon appropriate to level of students' understanding. Basically, English

as a Second Language, using the Audio-lingual approach whereby the student is taught to listen and speak before reading and writing. The goal is to help the student learn enough English to function in a regular class. Within one or two years, depending on the student's progress and grade level, most students move out to a transition or regular class.

f) See Exhibit E, "Chinese Bilingual Education, a Preliminary Report," attached.

6. To provide a program to help new immigrant students acquire sufficient English in order to do regular class work and function in the school and community.

- a) 995 Full and Part time.
- b) 51 - Some one hour a day. Some 6 hours a day.
- c) 51 - 21.
- d) See Exhibit D.

7. The 1970-71 Budget is not as yet final and thus this question is unanswerable for the 1970-71 fiscal year. Attached, as Exhibit F, is the 1969-79 budget.

a, b) See affidavits filed by defendants in this matter. These funds come from varying sources, including Federal and State funding and funds from this District's own budget.

c, d) See affidavit of Isadore Pivnick previously filed in this matter.

e) Affidavit of Isadore Pivnick, Exhibits F and G, "Compensatory Education Plan," attached.

8. a) 1,610.
b) 63, 33.
c) 61.

1) Full time - 6 hours per day. Part time 1 hour a day.

2) English as a Second Language.

3) All classes in which the teacher is bilingual will have some bilingual instruction. The native language is used for explanation, to clarify a point, and give directions. State texts for Americanization or English as a Second Language will be used along with materials prepared by the teacher.

- d) See answer to question #7.
- 1) \$656,243.
- e) See Exhibit H attached.
9. a) 104.
- b) 19 at a transition level.
 - c) 72.
 - d) 8.
- 1) 6 Bilingual.
- e) The Center uses an audio-lingual approach to the learning of English and English vocabulary of related subject matter. Strong emphasis is placed on experience in doing in an effort to relate language to culture, and the youngsters first culture and language to the new ones he is acquiring.
- 1) Yes.
- f) A tentative budget of \$200,000 which will not be firm until it is approved by the Board of Education. This budget would include a director, a screening community teacher, a curriculum writer, a resource teacher, 11 classroom teachers, 1½ clerks, and 2 school aides. This would handle approximately 165 students at any one time. It would also provide for curriculum development, the training and upgrading of classroom teachers, and the screening of all incoming families with elementary age youngsters.
10. All positions in the Bilingual Education Program are presently filled. When new ones are created the School District will actively recruit qualified applicants to fill those positions. This District does not maintain statistics on qualified bilingual applicants nor on numbers not hired.
- a) Since the passage of Education Code Section 13187.6 there have been no openings for teachers in the Chinese Bilingual Program, thus no new hirings.
11. a, b, c) Such statistics are not maintained by this School District.
- d) July 1968 to April 1969 (10 months) 691 *
 - e) July 1969 to January 1970 (7 months) 538 *
- * Based only on schools in the Chinatown area.

12. See answer to #11.
13. This School District does not keep statistics as to the information sought in this interrogatory.
14. See answer to #13.
15. See Exhibit C, page 2.
16. The long-range goal of the Spanish Bilingual Education Program is to provide the opportunity for students to gain competence in English and Spanish skills from Kindergarten through Grade Twelve. Besides academic progress, Spanish-speaking students of the target population will gain a sense of identity and pride in their cultural heritage. Participants in the program whose dominant language is English will gain proficiency in Spanish and an appreciation of cultural diversity through association with Spanish-speakers.

a) According to a survey of November 21, 1967 based on teacher opinion, there were 1,890 Spanish-speaking students in need of special instruction in English before they could do regular classwork. As teachers identified only the most severely handicapped, it was assumed that a comprehensive testing program would have yielded a much higher figure.

b, c) During the 1970 Spring semester the Spanish Bilingual Education Program is servicing 686 students at seven elementary and five junior high schools. There are 16 elementary teachers and 10 junior high teachers, all of whom are bilingual (English and Spanish), with the exception of three ESL teachers and the teacher for the Filipino program, who is bilingual in Filipino and English. (also see Exhibit I attached regarding enrollment.)

d, e) The ESL classes are taught primarily with the audio-lingual method, using the H-200 materials at the elementary level and the *English For Today* series at the junior high level. The Spanish Bilingual Education Program initiated a Spanish reading program for the child entering school with little or no knowledge of English.

The concepts in science, mathematics and social studies involve a two-level approach. The teacher first

utilizes the student's native language, Spanish, for the initial presentation, discussion and internalization of the specific concepts, which are developed in depth. The second level utilizes sequentially developed, systematically taught English language structure; thus the student is offered the opportunity to express those concepts first internalized in Spanish, now in the second language, English. In this way the student does not fall behind his grade level in the content subject material of science, mathematics, and social science while he is practicing English structures on a limited and less sophisticated level.

The model for languages of instruction indicates roughly the percentage of Spanish and English used during instruction in various curriculum areas. See diagram, Exhibit J, attached.)

17. Yes.

a) Approximately 13,667 students in grades K through G are involved in the "Sullivan Reading Pilot Project." The District does not keep ethnic statistics for this group of children. The program presents a structured approach to the English language. For non-English-speaking students, the Sullivan Reading Program is not the total reading program, but one in which they learn to decode and encode words and learn sound-symbol relationships and combinations.

b) A test is administered to diagnose the specific needs of the student in terms of decoding and encoding the English language. Post-tests are administered on a regular basis to evaluate the student's ability to use the specific decoding and/or encoding skill that had been taught.

/s/ Irving G. Breyer
IRVING G. BREYER

Subscribed and sworn to before me this 26th day of May, 1970.

(Exhibits A, D, F, G, H, I, and J to the answers to Interrogatories have been deleted from this Appendix)

[Declaration of Service Omitted]

EXHIBIT B

**SAN FRANCISCO UNIFIED SCHOOL DISTRICT
OFFICE OF SUPERINTENDENT**

**135 Van Hess Avenue
San Francisco, California 94102
Telephone: (415) 863-4680**

**BILINGUAL EDUCATION
IN THE
SAN FRANCISCO UNIFIED SCHOOL DISTRICT**

**Robert E. Jenkins
Superintendent of Schools**

November 21, 1967

BILINGUAL EDUCATION IN THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT

The children and youth who come to our schools with no knowledge of English have two basic needs: to learn English so that they can communicate with others and proceed normally with classroom work in our language, and to find the contributions of their own language and culture recognized and respected.

The term "bilingual education" as here used refers to the instructional programs carried on in the schools to meet these two needs. There are a number of such programs and they vary in structure in accordance with the number, age, and background of students and the special skills and aptitudes of teachers.

Numbers of Students Concerned

A survey just completed asked schools to report, by grade, the numbers of students who need help in learning English. The report was made in terms of two categories —those who have little or no facility in English and are in their first year of instruction in the language, and those who are more advanced in English but need further instruction in it to enable them to function effectively in a regular class. The numbers reported are summarized in the accompanying table (page 2). It is evident from these data that the bilingual education program deserves major consideration in San Francisco. The figures confirm, too, that those in need of help in learning English are for the most part native speakers of the two languages, Chinese and Spanish.

Classes in English as a Second Language

Classes in which the governing objective is to help students learn to communicate in English are known as English as a Second Language or ESL classes. Instruction in these classes is carefully planned, in the same way that foreign language instruction given to English speaking students is planned. The audio-lingual approach

is the one followed, with understanding and speaking given first emphasis and reading and writing following in due course.

While emphasizing the learning of English, ESL programs also recognize the importance of the student's native culture and include in the content of instruction relevant material drawn from that culture. They include appropriate use of field trips, resource persons, and current activities and events in the community.

Instruction through the Medium of the Native Language

In ESL classes, English is the medium of instruction and the native language is used, where at all, only for necessary explanations; this is in order that the main objective, mastery of English, be gained as rapidly as possible. The ESL program must always be recognized as the primary one; concurrent with it, however, it is sometimes possible to conduct a supporting program in the medium of the native tongue. Such a program can help prevent educational retardation, and can also reinforce family pride in the native language and culture. The extent to which instruction in the native language can be provided depends upon:

1. The presence of suitable groupings of students in sufficient numbers to make a class of those with the same native language, of the same grade level, and ready to take the same subject;
2. The availability of suitable instructional materials;
3. The availability of bilingual teachers of the grade level or subject in question;
4. The possibility of suitable scheduling arrangements in the school program.

Dr. A. Bruce Gaarder, Chief of the Modern Foreign Language Section of the U. S. Office of Education, suggests experimentation in offering one class period per day for instruction in what he calls the "non-English mother tongue". He points out the need to reinforce the self-image of non-English ethnic groups as speakers of their native language, and at the same time underlines

**Numbers of Students Who Need Special
Instruction in English**

Beginning: Those whose native language is not English and who are in their first year of instruction in the English language.

Others: Those who are beyond the beginning level but who need more work in English to be able to do well in a regular class.

Grade	Chinese		Spanish Speaking		Other Languages	
	Beginning	Others	Beginning	Others	Beginning	Others
Childrens Centers Nursey						
Pre-K	44	0	20	0	5	0
K	31	15	78	12	2	3
1	148	186	184	104	44	63
2	146	191	86	167	54	51
3	67	175	49	86	33	42
4	78	181	46	100	22	65
5	68	185	38	139	25	58
6	70	107	30	84	18	25
7	61	117	38	74	9	29
8	50	53	83	54	22	12
9	54	60	57	45	12	9
10	55	113	78	55	16	24
11	21	123	8	50	0	34
12	4	105	6	58	3	35
Total	906	1549	831	1059	278	457

the importance of learning through the language rather than concentrating on the language itself.

California State Law on Bilingual Education

The bilingual education program has been strengthened by a recent modification in state law. Formerly there was a provision in the Education Code that "All schools shall be taught in the English language". A 1967 amendment changes part of Section 71 of the Code to read:

English shall be the basic language of instruction in all schools.

The governing board of any school district and any private school may determine when and under what circumstances instruction may be given bilingually.

It is the policy of the state to insure the mastery of English by all pupils in the schools; provided that bilingual instruction may be offered in those situations when such instruction is educationally advantageous to the pupils. Bilingual instruction is authorized to the extent that it does not interfere with the systematic, sequential, and regular instruction of all pupils in the English language.

The Superintendent of Public Instruction has commented on this amendment in part thus:

I consider this amendment to be the most important piece of legislation affecting our non-English speaking pupils for it permits instruction of subject matter in the language of the non-English speaking child while he receives systematic, sequential and regular English instruction simultaneously. This permissive legislation passed during the 1967 regular session will go into effect the 61st day after the State Legislature adjourns.

The intent of the law is to permit the non-English speaking child to progress in his studies in his native language while learning the English language until he reaches that stage of language development

where he can compete successfully with his peers in the dominant language. The law does not intend to substitute one language for the other as a medium of instruction. Its purpose is to make it possible for schools to adjust their programs to provide effective bilingual instructional programs where needed.

Proposals for Action

Early in September, at the Superintendent's direction, a committee representing all instructional levels was formed to review the programs being carried on by the School District for non-English speaking students. Brief descriptions of some of these programs are appended to this report. At the present stage of its discussions the committee recommends that work proceed along these lines:

1. Expand the offering of classes in English as a Second Language to the extent required by numbers of students who need this help. The classes should be as homogeneous in English proficiency as possible.
2. Continue to develop materials for use by the teachers of ESL classes, and to evaluate such instructional materials and equipment as are available commercially.
3. Provide inservice courses for teachers of ESL classes.
4. Where considered feasible and desirable, encourage instruction through the medium of the native language in classes distinct from ESL classes. Such instruction should occupy for each student probably not more than one period per day; instructional content could well include references to the background and contributions of the native culture. In the junior and senior high schools, these classes should be open as electives to all students, not ESL students alone.
5. Develop additional units on the contributions and culture of the groups represented in our schools

for inclusion at appropriate points in the regular social studies curriculum as taught in English.

6. Continue the development of tests to assist in placement of students in ESL classes.
7. Search for new and innovative procedures in the teaching of English as a second language.
8. Look for outside sources of funding to assist in expanding and strengthening School District program.
9. Compare and evaluate the programs and approaches in the bilingual program, to determine their relative productiveness as a guide for future development.

The committee notes that Spanish as a language is offered at all grade levels from 6 through 12, and suggests that Spanish classes can be a useful vehicle in reinforcing pride of Spanish-speaking students in their native background and culture. Classes in Mandarin Chinese, providing like benefits, are offered in two elementary schools, two junior high schools, and four senior high schools. Study might well be given to the possibility of expanding the offering of the Chinese language.

School Programs in Bilingual Education

These brief descriptions of school programs are included to illustrate the excellent work that is being done in the bilingual program in the San Francisco schools. In these programs teachers make use of a wide variety of instructional materials, some developed here and some published commercially. Teachers demonstrate great ingenuity in producing worksheets and other instructional items to fit the needs of their particular classes; curricular materials are developed also by the School District. Some District publications are *A Guide to Bilingual Education in the Elementary Grades*, *Reading Lessons in English as a Second Language*, and, at the adult level, *English (Americanization—Literacy)*. Tapes as well as printed materials are used. New Materials are sought out and tried as they become available.

Information to be taken home is often prepared in both English and the native language. Counseling, both group and individual, is an important part of all the programs.

Commodore Stockton School

Two types of programs are in operation. In one, for beginners, ESL students remain with the same teacher for most of the day and go to regular classes only for mathematics and physical education. There are two such classes of 15 to 17 pupils each, in grades 4 through 6. In the other program, the pupils are in regular classes most of the day but meet in small groups of 6 to 8 for about 50 minutes daily for special work in English.

Junipero Serra School

Two first-grade ESL classes meet with the same teachers throughout the day. They take all regular first-grade subjects with emphasis on the learning of English, and in addition have 50 minutes of concentrated ESL work daily.

Patrick Henry School

Two special groups of Spanish-speaking children in grades H5, L6, and H6 are formed. One, made up of those who do not speak English, works with a compensatory teacher 50 minutes daily on learning English. The other, composed of bilingual pupils, studies Latin-American culture in classes conducted in Spanish. Once a week the two groups meet together to hear a resource speaker discuss some topic of interest in Spanish, or to hear reports by pupils on their own bicultural studies.

Other Elementary Schools

Elementary schools wherever there are pupils who need help in English provide ESL classes which meet about 50 minutes daily, with the pupils attending regular classes the rest of the time. Teachers for the ESL classes are provided in the compensatory program.

Francisco Junior High School

Here eight sections of Chinese-speaking students are grouped within the seventh, eighth, and ninth grades respectively as beginning, intermediate, or advanced in English. The students in these sections remain together for all subjects except physical education; course content and teaching methods in the various subjects are designed specifically for them. English is the only medium of instruction, but a great deal of attention is given to maintaining interest in and appreciation of the Chinese cultural heritage. The teachers are almost all bilingual in Chinese and English.

Horace Mann Junior High School

A project in bilingual education is in operation, with 57 Spanish-speaking students assigned to it. The students are divided into three groups according to competence in English. Each group has three classes daily in the program with teachers who are bilingual. Two of these classes are classified as English as a Second Language and the third as Bilingual Studies. Classes in Bilingual Studies are taught in Spanish; the content includes orientation to the new country and new surroundings together with material from the regular curriculum.

This project utilizes experience gained during the summer of 1967, when a bilingual program was instituted in the summer school held at Horace Mann. At the same time a workshop for teachers in the bilingual program was conducted; classes for Spanish-speaking students at Horace Mann and for Chinese students at Benjamin Franklin provided demonstration and practice teaching opportunities for the teachers in the workshop.

Marina Junior High School

There are 6 ESL sections; students in them take English and Social Studies together plus sometimes a third subject, and the rest of the day are in regular classes. Vocal music has been found to be a particularly helpful outside elective, as has mathematics also.

Other Junior High Schools

James Lick and Luther Burbank Junior High Schools also have special classes in which a teacher works with a group of students who have not sufficient command of English to succeed in regular classes. These classes remain together through most of the day, taking the subjects in the regular curriculum but with emphasis on the learning of English.

Samuel Gompers High School

Most students of senior high school level who speak another language and need instruction in English go to Samuel Gompers High School for this instruction, although beginning this fall there are two pilot classes in other schools. The pilot classes are at Mission High School, for Spanish-speaking students, and George Washington High School for those who speak Chinese.

ESL students at Samuel Gompers are classified as beginning, intermediate or advanced. Students spend the full school day in classes where the learning of English is the main objective but the content of regular school subjects is included. Instruction proceeds through the accepted audio lingual sequence, beginning with listening and speaking and continuing to reading and composition. A language laboratory provides supplemental instructional help. Students are usually ready for successful participation in a regular high school program after a year of ESL instruction.

Adult Schools

More than eighty classes in English for the Foreign Born are offered as part of the regular Adult School program. Situated in approximately twenty different locations, these classes serve the ever increasing non-English speaking immigrants. In addition to the eighty classes, more than sixty other ESL classes are conducted at numerous locations in the Mission and Chinatown areas under the District's ESEA project. The audio-lingual approach, with emphasis on developing competence in oral communication, is used in all the classes.

City College of San Francisco

City College offers a number of courses in English for the foreign-born, all of which qualify for parallel credit at the University of California. One course provides work in grammar, word study, writing, idiom, and sentence structure; another gives practice in oral expression and in reading; a more advanced course emphasizes the development of the reading and writing skills necessary to college work. There are also courses in English composition for foreign students and in American speech, the latter being designed to develop correct accent, intonation and pronunciation.

Goals of Bilingual Programs

The goals sought in the bilingual programs in the San Francisco schools have been well summarized in a statement developed at Commodore Stockton School, which lists these goals thus: (1) To help the students develop a core of high-frequency vocabulary both on the recognition and spoken levels, to develop a habitual use of a correct pronunciation and English speech patterns, and to develop elementary reading and writing skills; (2) To provide a comfortable environment where these students can make good social and psychological adjustments; (3) To give the students the opportunity to share and take pride in their rich cultural background of history, folktales, and customs; (4) To help the students become familiar with our way of life in America; and (5) to help the students reach a level of English proficiency that will permit them to function effectively in a regular classroom.

Total -

四

570 .2

PART A: Indicate the number of students who, in your opinion, need special instruction in English, classifying them by Grade and native language. Indicate also whether students are in:
(1) their first year of instruction in English or

- (1) their first year of instruction in English or
(2) beyond their first year, but still need help to be able to do regular class work

CHINESE	SPANISH	PILIPINO	(Please indicate other specific language background)						
			1st yr.	Beyond 1st yr.	1st yr.	Beyond 1st yr.	1st yr.	Beyond 1st yr.	1st yr.
Grade	1st yr.	Beyond 1st yr.							
K	250	26							
1	180	81							
2	67	117							
3	75	145							
4	87	123							
5	69	129							
6	85	123							
7	134	137							
8	118	125							
9	152	230							
10	11	141							
11	19	105							
12	3	68							
Total	1233	1601							
			27	344	344				
			1255	1601	2856				

PART B. Of all students who need help with English as shown in Part A., please indicate the number receiving some kind of special instruction in English.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
OFFICE OF SUPERINTENDENT

185 VAN NESS AVENUE
SAN FRANCISCO, CALIFORNIA 94102

Telephone: (415) 863-4680

CHINESE BILINGUAL EDUCATION

UNOFFICIAL COUNT: NOT FOR GENERAL RELEASE
IMMIGRANT STUDENTS July 1969-January 1970

(7 months)

ELEMENTARY (7 schools in Chinatown)

	New Students	Those Needing Help with English
July, August, September	306	228
October	16	15
November	11	11
December	28	28
January, 1970	34	28
	<hr/>	<hr/>
	395	310

SECONDARY (2 Junior High Schools, 2 Senior High Schools)

July, August, September	183	163
October	24	24
November	16	16
December	19	19
January 1970	21	6
	<hr/>	<hr/>
	263	228
GRAND TOTAL	<u>658</u>	<u>589</u>

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
OFFICE OF SUPERINTENDENT

135 VAN NESS AVENUE
SAN FRANCISCO, CALIFORNIA 94102

Telephone: (415) 868-4680

CHINESE BILINGUAL EDUCATION

UNOFFICIAL COUNT: NOT FOR GENERAL RELEASE
IMMIGRANT STUDENTS July 1968-April 1969

(10 months)

ELEMENTARY (7 schools in Chinatown)

	New Students	Those needing Help with English
July, August, September	123	101
October	14	10
November	19	16
December	34	33
January	33	79
February	56	53
March	41	40
April	51	37
	421	369

SECONDARY (2 Junior High Schools, 2 Senior High Schools)

July, August, September	104	102
October	35	34
November	14	14
December	10	9
January	38	37
February	53	48
March	44	40
April	41	38
	339	322
GRAND TOTAL	760	691

**CHINESE BILINGUAL EDUCATION—Survey of student needs
in English as a Second Language**

ELEMENTARY DIVISION

	<u>CHINESE</u>		<u>SPANISH</u>		<u>PILIPPINO</u>	
	<u>1st year</u>	<u>Beyond 1st</u>	<u>1st year</u>	<u>Beyond 1st</u>	<u>1st year</u>	<u>Beyond 1st</u>
ALAMO	9	8			1	
ARGONNE	11	17			3	
CHINESE ED. CENTER	66					
CABRILLO	7	5			1	
COMM. STOCKTON	197	183				
COLUMBUS		4			2	
COOPER	22	14	3	1		
FRANK MCCOPPIN	32	17	3	4	11	7
GARFIELD	41	60	9	5		
GEO. PEABODY	27	10	4	1	4	1
HANCOCK	15	30	1	6		1
JEAN PARKER	78	105				
JEFFERSON	7	9			2	5
MADISON	9	1	1			
REDDING	26	10	1		1	1
SHERMAN	9	25	4	8	1	5
SPRING VALLEY	57	55				1
SUTRO	9	4				2
SUTRO ANNEX	3					
WASHINGTON IRVING	40	77	—	—	—	—
	660	634	25	34	19	24

**CHINESE BILINGUAL EDUCATION—Survey of student needs
in English as a Second Language**

JUNIOR-SENIOR HIGH DIVISION

	CHINESE		SPANISH		PILIPPINO	
	1st year	Beyond 1st	1st year	Beyond 1st	1st year	Beyond 1st
FRANCISCO	81	189	1			
PRESIDIO	15	28	1			
MARINA	309	236				1
ROOSEVELT	9	13	3	3	1	5
	414	466	5	3	1	6
GALILEO	20	185	1	23		
GEORGE WASHINGTON	0	30				
SAMUEL GOMPERS	15	153	16	47	2	13
	35	368	17	70	2	13

**CHINESE BILINGUAL EDUCATION—SURVEY OF NEEDS
FOR ESL
ELEMENTARY**

(Under 10% Chinese population)

	NEED SPECIAL HELP	RECEIVING SPECIAL HELP
ALVARADO	10	1
ANDREW JACKSON	5	
ANZA	6	3
BESSIE CARMICHAEL	2	
BRYANT	1	4
CLEVELAND	4	
COMMODORE SLOAT	2	2
DANIEL WEBSTER	2	
DIAMOND HEIGHTS	1	1
DOUGLAS	4	
EDISON	7	
E. R. TAYLOR	6	
EL DORADO	4	3

	NEED SPECIAL HELP	RECEIVING SPECIAL HELP
FAIRMOUNT	1	15
FARRAGUT	2	
FRANCIS SCOTT KEY	6	9
FREMONT	5	1
GLEN PARK	3	
GOLDEN GATE	2	
HAWTHORNE	8	5
HILLCREST	4	1
GEARY	4	
JOHN MCLAREN	2	
JUNIPERO SERRA	1	
LAFAYETTE	22	22
LAGUNA HONDA	16	1
LAKESHORE	2	3
LAWTON	7	
LE CONTE	6	
LINCOLN	2	
LONGFELLOW	2	
MARK TWAIN	3	
MARSHALL ANNEX	11	4
MCKINLEY	3	
PARKSIDE	1	
PATRICK HENRY	1	
PAUL REVERE	1	
RAPHAEL WEILL	1	
R. L. STEVENSON	4	
SANCHEZ	15	4
SUNNYSIDE	1	
	190	79

JUNIOR HIGH

	<u>NEED SPECIAL HELP</u>	<u>RECEIVING SPECIAL HELP</u>
A. P. GIANNINI	8	1
APTOPS	2	1
EVERETT	5	3
HERBERT HOOVER	13	5
HORACE MANN	1	
JAMES DENMAN	9	
JAMES LICK	1	
LUTHER BURBANK	14	15
PORTOLA	4	
	<u>57</u>	<u>25</u>

SENIOR HIGH

A. LINCOLN	12	4
BALBOA	1	
LOWELL	32	5
MISSION	9	3
POLYTECHNIC	2	
WILSON	2	2
JOHN O'CONNELL	14	8
	<u>72</u>	<u>22</u>

EXHIBIT E

**SAN FRANCISCO UNIFIED SCHOOL DISTRICT
CHINESE BILINGUAL EDUCATION**

A PRELIMINARY REPORT

**DR. ROBERT E. JENKINS
SUPERINTENDENT OF SCHOOLS**

1968

PREFACE

Programs for teaching English as a second language have grown in increased prominence in areas with great influx of foreign-born students. The field is relatively new in the public school curriculum. Most of the programs developed have been with students of Spanish heritage. San Francisco, unlike the majority of U.S. cities, has immigrant Chinese-speaking students outnumbering the Spanish-speaking students. Due to the cultural and linguistic differences between the two groups, it has been necessary to create a new program for teaching English to Chinese-speaking students. Upon the recommendation of Superintendent Robert E. Jenkins, the Board of Education passed a resolution for the formation of the Chinese Bilingual Education Program. Mr. Wellington L. Chew was appointed the Supervisor for the innovative program.

Since the inception of the program, requests have been made from educators and interested citizens around the globe for information regarding the new program. It is the intent of this report to make known some of the general features of the Chinese Bilingual Education Program, including an overview of its background, objectives, and progress.

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PART I

BACKGROUND

San Francisco, with its majestic harbor and unique geographical situation, has been the major point of disembarkation for thousands of Chinese immigrants during the past few decades. The immigrant families settle and congregate within a few blocks radius from Grant Avenue, the heart of Chinatown. Customs, traditions, and language of the old country have been kept, practiced, and passed along to the new generations.

Chinatown has become a self-contained little community within the metropolis of San Francisco. Immigrant Chinese need not ever learn the English language to find employment, recreational activities, or social outlets in Chinatown. Most of the business is transacted in both English and Chinese. There are many temples and churches where the priests and ministers are bilingual. The grocery store clerks, the waiters, the physicians, and the bankers all speak Chinese. There are several elementary and secondary schools offering instruction in the Chinese language. Most of the children in the area attend these Chinese language schools in the late afternoons or early evenings after a full day of regular public school.

The immigrant family, in settling with its own people, has limited opportunities for assimilation into the American culture and language. Often, the immigrant student's only contact with the English language is during class time. After class, during lunch and recesses, the immigrant child tends to seek friends among other new arrivals, whose problems and interests are similar to his own. In so doing, there develops a further bond of reinforcing the Chinese language. Few opportunities are afforded or necessary for the student to speak English once he is back home in Chinatown.

In recognizing the need for special classes, the School District has offered English classes to schools where the enrollment of immigrant Chinese has been high. Some of these classes have been called Americanization classes.

Special bilingual teachers have been assigned to teach these classes.

More recently, in the elementary division, teachers of the compensatory classes have taught English to the newly-arrived students. The compensatory class is a pull-out program where about 12 students receive 50 minutes of English instruction daily. For the remainder of the day, the students attend their regular classes.

In February 1967, two pilot classes were established at the Commodore Stockton Elementary School. There are fifteen to seventeen students in each of the classes. The students remain in these classes for all subjects. The lessons in use have been developed by Miss M. Beatrice Sutherland. Two thirty-minute periods of intensive drills are scheduled for the morning and afternoon sessions. Supplementary teaching materials include the Miami Linguistic Series, the Flash-Picture Cards and charts.

Francisco Junior High School, located in the North Beach District, has been the receiving school for many of the elementary schools around the Chinatown area. The enrollment of immigrant students to this school has been particularly high. The school offers eight sections of beginning, intermediate, and advanced English for immigrant students in grades 7, 8 and 9. The students remain in these sections for all subjects except physical education. The subjects are taught in English that is appropriate for the students level of competency in the language.

Marina Junior High School also has been the receiving school for many immigrant students. Six sections have been established to accommodate the new arrivals. The students remain together in the sections for English, social studies, and a third subject such as mathematics or vocal music. The students return to their regular classes for the rest of the day.

A pilot class of 20 senior high school students began at George Washington High School during the summer of 1967 and continued through the regular semester. Students enrolled in this class needed special admission because the high school is considered out-of-the district for Chinatown residents. Materials used for the class included the Sutherland lessons.

Samuel Gompers High School receives the majority of the senior high students who need special help in English. The high school is located in the Mission District, a predominantly Spanish-speaking part of the city, and quite a long distance from Chinatown. The students at the high school are classified as beginning, intermediate, or advanced. They remain in classes where the regular school subjects are taught with emphasis on learning English. A language laboratory provides supplemental instructional help. Students are usually able to return to regular classes on a full-time basis after one year of intensive English study in the special classes.

PART II

SUMMER 1967

A consultant, Miss M. Beatrice Sutherland and two curriculum assistants, Mrs. Nora Haymond and Mrs. Jennie Wong, were appointed to work under the guidance of Dr. Joseph B. Hill, Coordinator, Curriculum. A *Guide to Bilingual Education*, with accompanying tapes was issued, together with a *Reading Pamphlet for Trial Use*. During this time, Miss Sutherland began writing lessons expressly for the School District.

PART III

FALL 1967

A project head, Mr. Elmer Gallegos, and two curriculum assistants, Mr. Philip A. Lum and Mrs. Susan Chang, were appointed to work in the Curriculum Department. The new members assisted in collecting data through interviews and questionnaires concerning the needs of the School District. A bilingual committee, which included educators from all levels of instruction, was formed. An in-service course on teaching English as a second language was implemented. Enrollment in the course was about 150 administrators and teachers. Instructors for the course included Mr. Eddie Hanson, Dr. Kenneth Croft,

Miss M. Beatrice Sutherland, Miss Wendy M. Jayne and Dr. Theodore Parsons.

Under the direction of Dr. Hill, the results of a survey on students needing special English instructions and the recommendations of the bilingual committee were published and presented to the Board of Education.

Due to the interest of civic leaders of the Chinese community and to the support of Superintendent Robert E. Jenkins, the San Francisco Board of Education passed a proposal to expand the Bilingual Education Program. Mr. Elmer Gallegos was appointed Supervisor of the Spanish Bilingual Education Program and Mr. Wellington Chew was appointed Supervisor of the Chinese Bilingual Program. In January 1968, the Board of Education passed the budget for the two programs.

PART IV

SPRING 1968

Recruitment of Teachers

Fourteen teachers (above the usual school-staffing formula) were assigned to eight elementary schools. Four (above formula) teachers were assigned to two junior high schools. The break-down was as follows:

ELEMENTARY SCHOOLS	NUMBER OF TEACHERS
Commodore Stockton	2
Garfield	3
Washington Irving	2
Jean Parker	2
John Hancock	1
Sarah B. Cooper	1
Spring Valley	2
Redding	1

JUNIOR HIGH SCHOOLS	NUMBER OF TEACHERS
Francisco	3
Marina	1

Teacher Training

Four days of orientation classes were held for the newly appointed teachers. Mr. Eddie Hanson, Consultant, California State Department of Education, Miss Wendy Jayne, Consultant, S.F.U.S.D., Miss Pauline Mahon, Principal, Garfield School, Mr. Philip Lum, Curriculum Assistant, were among the speakers. Questions and discussions followed each session.

Special meetings were held for ESL teachers in the program. Sharing and discussions helped clarify many of the unique problems encountered in the ESL classes. Guest speakers and consultants were also invited to talk on their experiences in the field.

The elementary ESL teachers were excused from their classes for two full days of observation in other ESL classes.

A new in-service course specifically designed for teaching English to Chinese-speaking students was offered. The enrollment was about seventy teachers, including a few from the East Bay. The instructors for the methodology meetings included Mr. Eddie Hanson, Mr. Allen Tucker, Director, Chinatown-North Beach English Language Center, Dr. Daniel Glicksberg, Professor of English, San Francisco State College. To talk on the cultural and sociological backgrounds of the students, the speakers were Miss Lorna Logan, Social Worker, Mr. Alan Wong, YMCA Worker, Miss Rosemary Chan, Community Teacher, and Mrs. Diana Ming Chan, Social Worker.

Teaching Materials

Most of the schools used the Sutherland Lessons as the core of their basic English instruction. Supplementary materials included the *Miami Linguistic Series*, the *BRL* and the *McGraw-Hill Sullivan Reading Program*, and selected readers. Garfield School used the *Project H200* lessons, developed at the University of California at Los Angeles.

Teaching aids embraced a variety of items such as the flannel board, the portable clock, the pocket chart, the

hand puppets, etc. Some of the aids which were most useful in drills included the *Flash-Picture Cards*, from Follette's Bookstore, Ann Arbor, Michigan, the items and action charts, and the calendar.

Miss Sutherland, working in Indonesia, continued sending her revised copies of the English lessons, which were finalized in booklet forms for distribution by the Curriculum Department. *General Notes to Spoken English: A Teacher's Guide*, by Miss Sutherland, and *Notes for Teachers of Chinese-Speaking Students*, by Miss Wendy Jayne, were published by the School District and distributed to the teachers. The revision of the reading lessons by the curriculum staff was also completed and is now being prepared for publication.

Consultant Services

Miss Wendy M. Jayne, who worked closely with Miss Sutherland, was appointed Consultant in English-as-a-second language. Miss Jayne made regular visits to the ESL classes. She met with the teachers for consultations and demonstrations. She also assisted in demonstration of teaching techniques in the in-service course.

Miss Jayne began writing the *Student's Handbook* to complete the Sutherland Lessons. The *Student Handbook* is designed as a reference for the individual students to use as he makes progress in the Sutherland English Lessons.

Mini-Conversation Cards by Miss Sutherland were distributed to the students. Each student received a set of the cards to practice common English expressions and idioms. The Mini-Conversation Cards keep pace with the Sutherland Lessons.

Student Selection and Class Placement

Identification of students needing special help in English was made through recommendations of the regular teachers and administrators. The potential ESL student usually was interviewed by the ESL teacher. Level of assignment was made according to the student's facility in English and his chronological age.

The average size for an ESL class in the elementary school was fifteen students. The division was made be-

tween primary grades and intermediate grades. Class size in the secondary school was slightly larger. The division of sections was made within each grade into beginning, intermediate, and advanced ESL classes. Where the enrollment of ESL students was lower, grouping was made on an ungraded basis according to ability.

Enrollment Figures for Spring 1968

Elementary Schools

	Chinese-Speaking Students	Other-Language Students	Total
Commodore Stockton	38		38
Garfield	37	2	39
Hancock	15		15
Cooper	17		17
Jean Parker	28	2	30
Spring Valley	27		27
Redding	11	1	12
Washington Irving	30		30
			<hr/> 208

Junior High Schools

Francisco	152
Marina	118
	<hr/> 270

ESL Classes Formed in Spring 1968 in the Elementary Schools

Commodore Stockton	one intermediate ungraded class one half-day intermediate class one half-day 3rd grade class
Garfield	one 1st-2nd grade class one 2nd-4th grade class
Hancock	one intermediate ungraded class
Cooper	one intermediate ungraded class
Jean Parker	one primary ungraded class one primary ungraded class
Spring Valley	one intermediate ungraded class one intermediate class one 2nd-3rd grade class
Redding	one intermediate class
Washington Irving	one intermediate class one 1st-4th grade class

PART V

SUMMER 1968

Summer In-service Workshop, 1968

In conjunction with the ESL summer school programs, a two-week workshop was offered to interested teachers from the elementary and secondary divisions. The purpose of the workshop was to present modern approaches to language teaching and to offer opportunities for actual practice teaching by the participants. Thirty five teachers attended the workshop.

Through the recommendation of Dr. Daniel Glickberg and Mrs. Dorothy Danielson, English Department, San Francisco State College, Mr. Edward Devlin was selected to program the workshop. The majority of the instructors for the course were from the American Language Institute, State College. The instructors were as follows:

Dorothy Danielson, Associate Professor of English, S.F. State College

John Dennis, Associate Professor of English, S.F. State College

Edward Devlin, Instructor, Monterey Peninsula College

James Kohn, Special Assistant, American Language Institute

Vern C. Neal, Assistant Director, American Language Institute

William C. Sinclair, Senior Linguist, Liberian Lang. Prog., S.F. State College

Darold Smith, Senior Linguist, Liberian Lang. Prog., S.F. State College

Allen Sharp, Assistant Director, American Language Institute

Kay Walker, Instructor, American Language Institute

Velma Winkler, Instructor, American Language Institute

Mr. Alan Wong, Mrs. Diana Ming Chan, and Mr. James Yang, informed leaders in the community, spoke on the heritage of Chinese students.

Content of the workshop included shock language lessons; MLS film; principles, methods and techniques of audiolingual instruction; comparative analysis of Chinese and English; classroom observations and practice teaching. Teachers were grouped into small sections for discussions on topics of particular interest to their specific grade levels. A tour of Chinatown, arranged by Mrs. Jan Sites, YWCA, Clay Street, and a tour of the Chinatown-North Beach English Language Center afforded further opportunities for the teachers to be acquainted with the community environment and services. The culmination of the workshop was a luncheon at Joe Jung's Restaurant. Teachers were able to meet informally with the instructors and to sample Chinese cuisine. Mrs. James Yang, Youth Director of the Chinese Baptist Church, gave a short resume of the educational programs in Hong Kong.

Rating sheets were given to the workshop participants on the last day of class to evaluate the effectiveness of the workshop. Results tabulated indicate that the teachers felt that the workshop was a success and "superior" in contributing to their knowledge of teaching English to Chinese-speaking students. The teachers were especially enthusiastic about their experience in practice teaching in the ESL classes. The general consensus among the teachers was for inclusion of more practice teaching in future workshops.

Tests and Guidelines

It is the intention of the Chinese Bilingual Program to make available tests and guidelines appropriate and effective for classroom instructions. *A Handbook of Tests and Guidelines for Chinese-Speaking Students* was compiled by the joint efforts of two curriculum assistants in consultation with Mr. Wellington Chew. The pamphlet was submitted to teachers and administrators for their review and evaluation. Suggestions and additions will be incorporated in the final revision.

Summer Schools

Under the direction of Mr. Wellington Chew, Supervisor, the Chinese Bilingual Education conducted summer schools for immigrant students in both the elementary and secondary divisions. The schools involved were Garfield, Jean Parker, Francisco and Galileo. The objective of the summer program was to help students continue to progress in their study of English. Through the intensive audiolingual method, a wide range of planned field trips, enriching activities, and informative talks with community resource persons, the students made impressive gains in the acquisition of the new language and culture of America.

APPENDIX A

BASIC OBJECTIVES

The basic objectives of English As a Second Language (ESL) Classes are derived from current linguistic science and successful teaching practices. The approaches to instruction and the administrative regimens presented in this course of study are directed toward the achievement of these objectives, which may be expressed as follows:

- To facilitate the rapid and effective adjustment of the student to his environment.
- To develop the communication skills (listening, speaking, reading and writing) in English as quickly as is feasible.
- To extend the pride in the student's native culture while developing an appreciation and understanding of the American way of life.

SOCIAL OBJECTIVES

To make every student feel that he belongs to the group.

To take into consideration the individual problems of each pupil—his emotional, and social needs—as well as his educational development.

To be aware of the social, economic, and cultural backgrounds of the students.

To provide satisfaction for students to participate in a group.

To promote social graces, greetings, courteous manners.

To develop primary health habits, cleanliness.

To develop respect for authority, parents, teachers, police, etc.

To promote growth in self-confidence.

To improve the student's self-image.

ACADEMIC OBJECTIVES

To develop listening-speaking skills through real and purposeful situations as indicated by the student's immediate needs, interests, and past experiences.

To provide a regular, continuous, systematic, sequential program.

To develop proficiency in English.

To help every student make effective use of the English language in listening, speaking, reading, and writing.

To encourage thinking in English.

To promote an interest in books, and literature.

To promote confidence in self-expression.

To increase vocabulary.

To increase fluency in reading.

To teach good reading habits.

To develop visual and auditory discrimination.

To help every student to achieve language mastery.

CULTURAL OBJECTIVES

To promote feelings of responsibility in school conduct and social relationships.

To develop respect for the rights of others and the property of others.

To provide opportunities for knowledge of the community.

To help the student accept the privileges and duties of being a citizen in a democratic community.

To facilitate the rapid and effective adjustment and participation of the student in the American culture.

To encourage the student's interests, and ambitions; to further student initiative.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-70 627 LHB

[Title Omitted]

PLAINTIFFS' AFFIDAVIT OF EDWARD H. STEINMAN—
Filed May 26, 1970

STATE OF CALIFORNIA)
)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

I, EDWARD H. STEINMAN, being duly sworn, hereby depose and say:

1. I am an attorney licensed to practice in the State of California, and the attorney of record in the instant matter.

2. On May 15, 1970, I was personally handed the attached Exhibit A from Dr. Richard C. Robbins, Director of the Special Educational Services Department of the defendant SAN FRANCISCO UNIFIED SCHOOL DISTRICT. Dr. Robbins declared that this Exhibit A reflects the number of students in the SAN FRANCISCO UNIFIED SCHOOL DISTRICT who were receiving special help from the Special Educational Services Department during the 1968-69 school year.

3. As the attached Exhibit shows, approximately 2,025 students classified as mentally handicapped received special help and instruction from defendant SCHOOL DISTRICT. Furthermore, Exhibit A shows that 869 students classified as educationally handicapped and an additional 6,000 students with various physical handicaps received special instruction and help. All these students were enrolled in special classes administered by the defendant SCHOOL DISTRICT during the school year 1968-69.

4. Dr. Robbins stated that no figures are currently available concerning the number of students served by the Special Educational Services Department for the school

year 1969-70. Yet, he informed me that the situation for the present school year is quite similar and that an equal number of students with mental, educational, and physical handicaps—which numbered over 9,000 last year—were currently receiving special instruction and help in special classes administered by the defendant SCHOOL DISTRICT. He further stated that, though the statistics are not kept on the number of students needing special help, the Special Educational Services Department is providing special help to most of the students within the School District with mental, educational, and physical handicaps.

/s/ Edward H. Steinman

[Affidavit of Service Omitted]

EXHIBIT A

SPECIAL EDUCATIONAL SERVICES (10,000 +)

	920	1000	800	1500	4500
Supervisor- Ment. Hand- Elem	Sup. Ment. Hand Secondary	Sup. Educ. Hand	Sup. Physically Hand.	Sup. Speech, Hear. Visual Hand.	Director
Miss Caine	Dr. Boyce	Dr. Dugger	Mr. Cunningham	Mr. Becker	Dr. Robbins
51 Classes-EI	765	71 classes-2nd	46 Units-Elem	65 Home Tahra	131
2 Classes TMR	156	40 JrHi 31 SrHi 560	11 Units-2nd	9 Hosp. Tehra	83
Lombard Sch	16	JrHiSch. (All) 398	9 Resident	Ortho School	4338
(Prin.-Smyth)	7	SrHiSch (of 8) 77	(+ 7 69-70)	(Prin-Scanlon)	42 Sp. Therap.
(+1 69-70)		7 Read Centers	7	5	(+ 2 69-70)
		Develop. Center	7 Service Cent	4	Deaf. School
		(Prime-Caruso)	(+1 69-70)		Spec. Ed. Transp.
					<u>PROJECTS</u>
			In Service EH	Deaf-Blind	Disturbed- Retarded
				Creative Movement	T.E.C.
				Blind	

EXHIBIT #5

LAU v. NICHOLS

**United States District Court
(N.D. Calif.)**

**Formal Project Application
BILINGUAL EDUCATION PROGRAM**

**Under the Provisions of Title VII
of PL 89-10, as amended**

TITLE:

**PILOT PROGRAM
CHINESE BILINGUAL**

SAN FRANCISCO UNIFIED SCHOOL DISTRICT

SAN FRANCISCO UNIFIED SCHOOL DISTRICT

FORMAL PROJECT APPLICATION
BILINGUAL EDUCATION PROGRAM

Under the Provisions of Title VII
of PL 89-10, as amended

TITLE:

CHINESE BILINGUAL PILOT PROGRAM

Submitted by:

San Francisco Unified School District
135 Van Ness Avenue
San Francisco, California 94102

Submitted to:

Division of Plans and Supplementary Centers
U. S. Office of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Date Transmitted: May 5, 1969

Prepared by
Supplementary Educational Center
ESEA Title III

(Pages 1-36 of this Exhibit have been deleted
from this Appendix)

APPENDIX

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I. THE COMMUNITY TO BE SERVED

A. *The Problem of Illiteracy in the Community:*

Located in the northeastern section of San Francisco, in an area approximately thirty-six square blocks, is picturesque Chinatown, the largest Chinese community outside of the orient. The exotic atmosphere provided by its shops, restaurants, temples, and art galleries makes it a major tourist attraction. But beneath the gay colors and bright lights is one of the major poverty areas of San Francisco. In this ghetto one finds substandard housing, overcrowded living quarters, the highest TB and suicide rates in the city, severe unemployment and underemployment. Of the 40,000 residents, 40.6% are designated as poor by the Office of Economic Opportunity. Some 12.2% of the poverty rated families have an annual income of less than \$2,000.

The low earning capacity of the residents can be attributed to their lack of English. The 1960 census shows the area to have the lowest median of school years completed. Statistics from the Adult Opportunity Center in Chinatown give a fair indication of the language needs of the residents. As of September, 1967, there were 2,872 active work applicants. Of these, 18.6% could speak no English; 40.1% had very limited English facility; 21.3% had some facility in English, but spoke with a marked accent. Only 20% of all the applicants had no serious problem with English.

The reason for the low education level is that the area has the highest percentage of foreign born in the city. Immigration figures for 1956 to 1960 show that 22,421 immigrants arrived in the United States from China and that approximately one-third settled in the Chinatown-North Beach Area.

On October 3, 1965 Congress enacted Public Law 89-236 changing the national Origins Quota System, which had determined the number of immigrants admitted to the United States from various countries over the last 40 years. The quota from China was 105 per year. The new law, which went into effect July 1, 1968, liberalized

immigration from the Far East. The San Francisco Economic Opportunity Council, Program Unit Office, estimates that in 1968-69 23,231 immigrants from China will be admitted and of these, 4,788 will settle in San Francisco. The increasing influx of immigrants will further aggravate the problem of illiteracy and poverty.

Many adults with experience in the professions or skilled trades are working in menial jobs as busboys, dishwashers, and kitchen helpers. Others come with a double handicap of being illiterate in both their native language and English.

The problem of the lack of English afflicts not only the adults but the children. A survey was conducted by the public schools in the Fall of 1967 to estimate the number of children who had deficiencies in English. For children from kindergarten through the 12th grade, there were 906 who were in their first year of English and another 1,549 who were beyond the beginning level but still needed help to function in regular classes. When these youngsters are placed in grade levels according to their age and are expected to compete with their English speaking peers, they are frustrated by their inability to understand the regular class work. The problem is particularly severe for those in the high school age group who do not have time to learn sufficient English before they reach the high school age limit. Few are motivated to continue through adult school and they become drop-outs.

In a real sense, Chinatown has become a slum as well as a ghetto. As part of the overall urban problem in America, it seems unlikely that the illiterate and poor can escape. The slums have become ingrown, their denizens increasingly isolated through the lack of education, skills and opportunities. The poor in Chinatown are part of the nation's poor who are impacted into a central city area from which there is no escape. They are trapped as surely as if there were barbed wire around Chinatown.

B. Existing Efforts to Cope with the Problem.

Both the public schools and some private agencies have tried to deal with the problem of English language learning for children and adults. The number of adults involved in learning English as a second language offered by the Adult Division of the public schools, plus those in MDTA English Training Programs, and those in agency and church programs total about 2,400. The demand exceeds the available sources. The majority of Chinese speaking adults who want to learn English attend Americanization classes offered by the Unified School District. As of December 20, 1967, some 1,623 were enrolled in these classes. Both day and evening classes are held to permit students who are working either day or evening to attend. In addition to the regular adult schools, ten different locations in churches and agencies in Chinatown are used.

Because so many of the adults work long hours, their English learning is limited to only two or three hours a day. The result is that many attend for years without enough progress to enable them to get a job outside of Chinatown. One program, on a very limited scale, the MDTA English Training Classes, partially financed by the Federal government attempts to cope with the problem of the working student who cannot find adequate time to go to school. About 100 foreign born Chinese were selected to attend classes eight hours a day, five days a week for 10 months. Financial allowances ranged from \$51.00 per week for a single person to \$81.00 maximum for those with a family.

Another 319 adults are being taught by churches, private agencies, and neighborhood houses.

The public schools have recognized the problem of the immigrant child for many years. Until the 1950's, because of the limitations on Chinese immigrants, the number of new arrivals was small enough so that students were accommodated in regular classes. After the Communist takeover of the Chinese mainland in 1949, San Francisco schools experienced a flood of immigrant youngsters. These were children whose fathers were citizens by derivation; that is, the grandfather or great-grand-

father was a citizen. In 1962, during President Kennedy's administration, a special refugee legislation allowed some five thousand immigrants to enter San Francisco from the Orient. Faced with the pressure of an increasing number of non-English speaking students in school, the school district established special Americanization classes in the secondary schools; two junior high and one high school in the Chinatown-North Beach Area. These classes were limited to about 20 students each, and students were taught using simplified materials appropriate to their level of understanding. Classes were begun in the secondary level before the elementary simply because there was a greater concentration of foreign born students in secondary schools which tend to have an enrollment of 800 to 2000 or more. Elementary schools usually are limited in enrollment to three or four hundred, so tend to have fewer foreign born students.

Due to recent changes in the immigration laws, an increasing number of students continued to flood the schools, both elementary and secondary. In the Spring of 1968, the school district appropriated funds to establish additional classes in the two junior high and one high school. Fourteen new classes were started in the seven elementary schools in the area. The relief has been temporary for, with the new immigration law, a steady stream of immigrant students has created a waiting list in many classes.

The classes in the elementary division are limited to fifteen students each. Although the program is called Chinese Bilingual Education, the method used is primarily the audio-lingual approach, or English as a Second Language. Teachers who can, do use some Chinese in teaching. The District is in the process of planning and developing a program that is actually bilingual in approach under funds to be received under ESEA Title VII.

The problem of English language learning affects both adults and children in the community. For adults, the lack of English results in unemployment or underemployment, low income and substandard living conditions for the family. For children, the lack of English means poor performance in school. The secondary student is almost inevitably doomed to be a dropout and become another

unemployable in the ghetto. The only hope of removing this cause of poverty lies in adequate education, vastly different in extent of services and in kind from what is available at present. The existing sources, both public schools and meager efforts by private agencies and churches, are woefully inadequate.

II. SURVEY BY SAN FRANCISCO UNIFIED SCHOOL DISTRICT (NOVEMBER 1968) OF ENROLLMENTS NEW TO SCHOOL DISTRICT (CHINATOWN-NORTH BEACH AREA)

A. Enrollment for September through February 1968-1969 (approximate figures):

Elementary School	380
Secondary School	255

B. Projected enrollment for 1969-1970 school year, immigrant students in the Chinatown-North Beach area:

Elementary School	760
Secondary School	460

III. DIVISIONAL SUMMARY OF RACIAL DISTRIBUTION OF PUPILS ATTENDING SAN FRANCISCO PUBLIC SCHOOLS

106

	<u>SS</u>	<u>OW</u>	<u>N</u>	<u>C</u>	<u>J</u>	<u>K</u>	<u>AI</u>	<u>F</u>	<u>ONW</u>	<u>TOTAL</u>
PRE-KINDERGARTEN										
(Including John Adams Family Life Pre-School Pupils)	100	46	208	82	8	0	9	12	12	472
%	21.2	9.7	44.1	17.4	.6	.0	1.9	2.5	2.5	99.9
ADULT EDUCATION										
	4,912	12,285	8,837	8,265	738	141	100	706	877	25,810
%	19.0	47.4	12.9	12.7	2.9	.5	.4	2.7	1.5	100.0
SPECIAL SCHOOLS & CLASSES										
	154	545	542	76	6	0	3	20	9	1,855
%	11.4	40.2	40.0	5.6	.4	.0	2	1.5	.7	100.0
CHILDREN'S CENTERS (Nursery)										
	50	216	286	65	8	0	1	5	26	652
%	7.7	33.1	43.9	9.9	.5	.0	2	3	3.9	100.0
TOTAL ALL SCHOOLS (Excluding City College)										
	17,818	49,970	29,446	16,091	2,410	261	296	3,197	1,953	120,942
%	14.3	41.3	24.4	18.3	2.0	2	3	2.6	1.6	100.0
CITY COLLEGE										
	681	7,525	1,488	8,169	(includes J & K)		45	279	(incl. ONW)	18,187
%	6.2	67.1	11.3	24.0			3	2.1	ONW)	100.0

September 27, 1968

IV. SURVEY OF LANGUAGE SPOKEN AT HOME
CANTONESE

I. Cantonese Spoken at Home

Elementary	6,281
Junior High	2,878
Senior High	8,386
Total	<u>12,445</u>

II. Cantonese-Speaking Children Enrolled in an ESL or Bilingual Class

Elementary	276
Junior High	267
Senior High	65
Total	<u>608</u>

III. Cantonese Speaking Children in Need, But Not Enrolled in an ESL or Bilingual Class

Elementary	1,061
Junior High	119
Senior High	50
	<u>1,230</u>

**NUMBERS OF STUDENTS WHO NEED INSTRUCTION
IN CANTONESE AND ENGLISH**

GRADES	Number of Children Whose Language at Home Is Chinese	Number of Children Enrolled in ESL, Bilingual or Compensatory Class	Number of Children in Need but not Enrolled in an ESL Bilingual or Compensatory Class	
			A	B
1			20	200
2			20	250
3			30	157
4			53	135
5			44	126
6			59	95
			70	98
Elementary Sub-Total - 6,231		276	1,061	
7	908		65	39
8	945		102	12
9	1,025		100	68
10	1,064		19	15
11	1,142		21	15
12	1,130		25	20
Secondary Sub-Total - 6,214		332	169	
DISTRICT TOTAL - 12,445		608	1,230	

V.

NUMBER OF CHINESE STUDENTS WHO NEED SPECIAL INSTRUCTION IN ENGLISH

C H I N E S E			
G R A D E		Beginning*	Others**
Childrens Centers	Nursery		
Pre-K	31	15	
K	148	136	
1	146	191	
2	67	175	
3	78	181	
4	68	135	
5	70	107	
6	61	117	
7	50	53	
8	54	60	
9	55	113	
10	21	123	
11	4	105	
12	9	38	
T O T A L	906	1,549	
G R A N D T O T A L		2,455	

* BEGINNING:

Those whose native language is not English and who are in their first year of instruction in the English language.

** OTHERS:

Those who are beyond the beginning level but who need more work in English to be able to do well in a regular class.

[Pages 12A-31A have been deleted from this Appendix]

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EXHIBIT No. 6

**U.S. DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE**

Office of the Secretary
Washington, D.C. 20201

HEW NEWS

or Release in A.M. Papers, Monday, May 25, 1970

MATHIS—962-5815
(Home)—522-6212

HEW-Z7

LAU v. NICHOLS

U.S. Dist. Court (N. D. Calif.)

EW Secretary Robert H. Finch today notified more than 1,000 U.S. school districts where language barriers discriminate against Spanish-surnamed students and other national origin minorities that such barriers must be removed.

The HEW policy was defined in a memorandum distributed today to all school districts with more than five percent national origin minority enrollment.

"If students cannot understand the language their teachers are using, it's hopeless to expect them to learn," Secretary Finch said. "There are some 2,000,000 Spanish-surnamed students in our public schools and almost 1,000 Oriental students. Overcoming the English language deficiency that exists is a first-order of business." Spanish-surnamed students include Mexican-American, Puerto Rican, Cuban and Latin-American national origins. The HEW memorandum, signed by J. Stanley Pottinger, Director of HEW's Office for Civil Rights, underscores responsibilities of the school districts under the law.

The Office for Civil Rights administers Title VI of the Civil Rights Act of 1964, which prohibits use of Federal funds for programs that discriminate as to race, color or national origin.

The memorandum is the first time the Department has defined its policies with regard to possible discrimination against national origin minorities.

Specifically, the memorandum states that where inability to speak and understand the English language excludes national origin minority group children from effectively participating in a school district's educational program, the district must take positive steps to correct the language deficiency in order to open the program to these students.

In addition, school districts must not assign these students to classes for the mentally retarded, as has been done on some occasions in the past, on the basis of criteria which essentially measure or evaluate English language skills. Districts also may not deny national origin-minority group children access to college preparatory courses on a basis directly related to the failure of the school system to teach English language skills.

The memorandum adds that any ability grouping or tracking system used by the school system to deal with the special language skill needs of these children must be designed to meet these needs as soon as possible and must not operate as an educational dead-end or permanent track.

School districts also have the responsibility to insure that national origin-minority group parents are notified of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.

"We realize, of course," Mr. Pottinger said, "that many school districts receiving the memorandum are already making extensive efforts on their own initiative to help remove English language deficiencies."

"For example, school officials are increasingly aware of the need to talk to parents in the language they best understand, in counseling and guidance sessions, in sending out written health notices, or in any other area of communication. These are examples of affirmative action that should be encouraged. There are many others."

Mr. Pottinger said that from now on the areas of concern he mentioned would be regarded by personnel in his office as a part of their responsibilities in their routine reviews of school districts to determine compliance with the Civil Rights Act of 1964.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-70 627 LHB

KINNEY KINMON LAU, a Minor by and through MRS.
KAM WAI LAU, his Guardian ad Litem, ET AL., PLAINTIFFS

vs.

ALAN H. NICHOLS, ET AL., DEFENDANTS

ORDER

A hearing was held in this case on May 12, 1970, upon plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss. Pursuant to Rule 65 (a) (2) of the Federal Rules of Civil Procedure, this Court—with the agreement of both plaintiffs and defendants—consolidated the trial of this action on the merits with the hearing on the two motions.

Initially, this Court can dispose of the defendants' motion to dismiss. Since jurisdiction lies in this case, under either Section 1331 or Section 1343 of Title 28 of the United States Code, and since plaintiffs have stated numerous claims upon which relief could be granted, this Court denies defendants' motion to dismiss.

FINDINGS OF FACT

The following facts have been stipulated to by the plaintiffs and defendants, and are thus found by this Court:

1. At present, there are 2,856 Chinese-speaking students in the San Francisco Unified School District who need special instruction in English.
2. Of these 2,856 Chinese-speaking students needing special instruction in English, 1,790 receive no special help or instruction at all.
3. Of the remaining 1,066 Chinese-speaking students who do receive some special help, 633 receive such

help on a part-time basis and 433 on a full-time basis.

This Court also finds as a fact that only 260 of the 1,066 Chinese-speaking students receiving special instruction in English are taught by bilingual, Chinese-speaking students.

This Court further finds the following facts to be true, though not stipulated to by the respective parties:

1. Defendants recognize the importance of an education and equal educational opportunities, and make education available to plaintiffs on the same terms and conditions as it is available to other groups within the School District.
2. This Court recognizes that defendants have made efforts toward remedial education programs for Chinese-speaking students, although whether such efforts are effective or in need of substantial improvement is a conclusion which this Court does not make.

CONCLUSIONS OF LAW

There is complete agreement among all parties—including this Court—that the plaintiffs have rights to an education and to equal educational opportunities, under the Constitution of the United States, the Constitution of the State of California, and laws enacted by the California State Legislature. The issue confronting this Court is what type of educational program satisfies these rights.

This Court fully recognizes that the Chinese-speaking students involved in this action have special needs, specifically the need to have special instruction in English. To provide such special instruction would be a desirable and commendable approach to take. Yet, this Court cannot say that such an approach is legally required. On the contrary, plaintiffs herein seek relief for a special need—which they allege is necessary if their rights to an education and equal educational opportunities are to be received—that does not constitute a right which would create a duty on defendants' part to act. These Chinese-

speaking students—by receiving the same education made available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District—are legally receiving all their rights to an education and to equal educational opportunities. Their special needs, however acute, do not accord them special rights above those granted other students.

Although this Court and both parties recognize that a bilingual approach to educating Chinese-speaking students is both a desirable and effective method, though not the only one, plaintiffs have no right to a bilingual education. Again, this Court is in no position to mandate that such instruction must be given by bilingual Chinese-speaking teachers; though desirable, there is no legal basis to require it.

Therefore, for the foregoing reasons, this Court must deny relief to plaintiffs. Accordingly, this Court now orders that plaintiffs' motion for preliminary injunctions, permanent injunctions, and declaratory relief be hereby denied, that defendants' motion to dismiss be denied, and that this Court finds for the defendants on the merits of this case.

IT IS SO ORDERED.

Dated: May 26, 1970.

/s/ Lloyd H. Burke
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 26,155

KINNEY KINMON LAU, a Minor by and through MRS. KAM WAI LAU, his Guardian ad Litem; DAVID LEONG, his Guardian ad Litem; YUE BEW LEONG, his Guardian ad Litem; JOAN YEE, a Minor by and through MRS. FUNG YEE YEE, her Guardian ad Litem; PAULETTE CHEUNG, a Minor by and through KUN CHEUNG, her Guardian ad Litem; JUDY SUN, a Minor by and through MRS. JULIA SUN, her Guardian ad Litem; WALLY TOM, a Minor by and through MRS. CHOI KAM TOM, his Guardian ad Litem; KAREN YEE, a Minor by MRS. FUNG YEE YEE, her Guardian ad Litem; KAREN CHIU, a Minor by and through MRS. MOY HOR CHIU, her Guardian ad Litem, and DAVID SUN; a Minor by and through MRS. JULIA SUN, his Guardian ad Litem, individually on their own behalf and on behalf of all others similarly situated,

KIT LING LEE, a Minor by and through HENRY LEE, her Guardian ad Litem; STANLEY CHEUNG, a Minor by and through KUN CHEUNG, his Guardian ad Litem; SAI CHONG LEE, a Minor, by and through HENRY LEE, his Guardian ad Litem; and SAI Ho LEE, a Minor by and through HENRY LEE, his Guardian ad Litem, individually on their own behalf and on behalf of all others similarly situated, PLAINTIFFS-APPELLANTS

vs.

ALAN H. NICHOLS, President, and DR. LAUREL, E. GLASS, DR. ZURETTI L. GOOSBY, EDWARD KEMMITT, MRS. ERNEST R. LILIENTHAL, HOWARD N. NEMEROVSKI, DR. DAVID J. SANCHEZ, JR., in their official capacities as members of the Board of Education of the San Francisco Unified School District; DR. ROBERT E. JENKINS, Superintendent of the San Francisco Unified School District; and MRS. DIANNE FEINSTEIN, President, and JOHN J. BARBAGELATA, ROGER BOAS, JOHN A. ERTOLA, TERRY A. FRANCOIS, ROBERT E. GONZALES, JAMES

MAILLIARD, ROBERT H. MENDELSON, RONALD PELOSI,
PETER TAMARAS, MRS. DOROTHY VON BEROLDINGEN, in
their official capacities as members of the Board of
Supervisors of the City and County of San Francisco,
DEFENDANTS-APPELLEES

[January 8, 1978]

Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS and TRASK, Circuit Judges, and
HILL,* District Judge

TRASK, Circuit Judge:

This appeal is from the district court's adverse disposition of a civil rights class action filed by appellants to compel the San Francisco Unified School District to provide all-non-English-speaking Chinese students attending District schools with bilingual compensatory education in the English language. The defendants-appellees are the superintendent and members of the Board of Education of the School District, and members of the Board of Supervisors of the City and County of San Francisco.

Two classes of non-English-speaking Chinese pupils are represented in this action. The first class, composed of 1,790 of the 2,856 Chinese-speaking students in the District who admittedly need special instruction in English, receive no such help at all. The second class of 1,066 Chinese-speaking students receive compensatory education, 633 on a part-time (one hour per day) basis, and 433 on a full-time (six hours per day) basis. Little more than one-third of the 59 teachers involved in providing this special instruction are fluent in both English and Chinese, and both bilingual and English-as-a-Second Language (ESL) methods are used. As of September 1969,

* Honorable Irving Hill, United States District Judge for the Central District of California, sitting by designation.

there were approximately 100,000 students attending District schools, of which 16,574 were Chinese.¹

Appellants' complaint states seven causes of action, alleging violations of the United States Constitution, the California Constitution,² Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and provisions of the California Education Code. Essentially, appellants contend that appellees have abridged their rights to an education and to bilingual education, and disregarded their rights to equal educational opportunity among themselves and with English-speaking students. They pray for de-

¹ The parties stipulated:

"1. There are—at present—2,856 Chinese-speaking students in the San Francisco Unified School District who need special instruction in English. . . .

a. Of these 2,856 Chinese-speaking students who need special help in English, 1,066 receive some help

b. Of the 1,066 Chinese-speaking students receiving help, 633 receive such help on a part-time basis and 433 on a full-time basis. . . .

"2. In November of 1967, there were 2,455 Chinese-speaking students in the San Francisco Unified School District who needed special instruction in English Of these 2,455 Chinese-speaking students needing special help, 473 received such help

"3. According to the annual reports of the Human Relations Division of the San Francisco Unified School District, the following represents the number of Chinese students in the San Francisco Unified School District in the years 1966-1969:

15,641 Chinese Students—October, 1966

15,559 Chinese students—October, 1967

16,091 Chinese students—September, 1968

16,574 Chinese students—September, 1969."

These statistics were provided by the parties to the district court in the first half of 1970. We have been given no reason to think that they no longer adequately reflect the relative dimensions of the problem the School District faces in attempting to provide quality education for all its students.

¹ The right to an education is claimed under the Fifth (Due Process), Ninth (Reserved Powers), and Fourteenth (Equal Protection Clause) Amendments to the Constitution of the United States; and under Article IX, Section 5 of the Constitution of the State of California (Provision for system of common schools).

claratory judgment and for preliminary and permanent injunctive relief mandating bilingual compensatory education in English for all non-English-speaking Chinese students.

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), and 1343 (civil rights). This court's jurisdiction arises under 28 U.S.C. § 1291, as the district court's order finding for appellees on the merits was a final order.³

As hereinbefore stated, the district court denied appellants all relief, and found for appellees on the merits. The court expressed well-founded sympathy for the plight of the students represented in this action, but concluded that their rights to an education and to equal educational opportunities had been satisfied, in that they received "the same education made available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District . . ." Appellees had no duty to rectify appellants' special deficiencies, as long as they provided these students with access to the same educational system made available to all other students.⁴

In appealing this case, appellants argue⁵ that the district court misconstrued the meaning of the mandate of *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), that education, "where the state has undertaken to provide it, is a right which must be available to all on equal terms." In *Brown*, appellants continue, "equal terms" meant without segregation imposed by law, because even though there was "surface equality," it "caused . . . a sense of inferiority in minority children which

³ Order p. 3. C.T. at 420.

⁴ Appellees challenge the employment of a class action in this case. Although the district court did not explicitly rule on this issue, its denial of appellees' motion to dismiss, and decision on the merits implicitly determined that the class action was proper. We agree, Fed. R. Civ. P. 23.

⁵ The amicus curiae briefs filed by the United States and the Center for Law and Education, Harvard University (Center) in support of appellants, which have been of great assistance to this court in reaching its decision, raise basically the same arguments as appellants.

affected their ability and motivation to learn and tended their educational and mental growth." Brief for Appellants at 21.

As applied to the facts of this case, appellants reason, *Brown* mandates consideration of the student's responses to the teaching provided by his school in determining whether he has been afforded equal educational opportunity. Even though the student is given the same course of instruction as all other school children, he is denied education on "equal terms" with them if he cannot understand the language of instruction and is, therefore, unable to take as great an advantage of his classes as other students. According to appellants, *Brown* requires schools to provide "equal" opportunities to all, and equality is to be measured not only by what the school offers the child, but by the potential which the child brings to the school. If the student is disadvantaged with respect to his classmates, the school has an affirmative duty to provide him special assistance to overcome his disabilities, whatever the origin of those disabilities may be.

Appellants' reading of *Brown* is extreme, and one which we cannot accept. There, the Court held that legally constituted and enforced dual school systems were unconstitutional as a denial of equal protection; that state-maintained "separate but equal" educational facilities, sanctioned by *Plessy v. Ferguson*, 163 U.S. 537 (1886), were no longer to be allowed. *Brown* concerned affirmative state action discriminating against persons because of their race. *Swann v. Board of Education*, 402 U.S. 1, 5 (1971). It struck down the denial of admission of black children to schools attended by white children under laws requiring or permitting segregation according to race. *Brown v. Board of Education*, 347 U.S. at 488. It followed the dictate of the Fourteenth Amendment, that "[n]o State shall . . . deny to any person . . . the equal protection of the laws." U.S. Const. Amend. XIV, § 1 (emphasis supplied). Therefore, under *Brown*, cases of de jure, as contrasted with de facto, discrimination violate the constitutional command.* Other cases have fol-

* Relying upon the third party beneficiary rationale of *Lemon v. School Board*, 240 F. Supp. 709, 718 (W.D. La. 1965), aff'd 370

lowed the same rationale, *Gomperts v. Chase*, 329 F. Supp. 1192, 1195 (N.D. Cal. 1971), *application for injunction pending filing of petition for writ of certiorari denied*, *supra* at 15-18; *Kelly v. Guinn*, 456 F.2d 100, 105 (9th Cir. 1972); *Keyes v. School District No. 1*, 445 F.2d 990, 999 (10th Cir. 1971), *cert. granted*, 404 U.S. 1086 (1972); *Davis v. School District*, 443 F.2d 573, 575 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); *Deal v. Board of Education*, 419 F.2d 1887, 1888 (6th Cir. 1969), *cert. denied*, 402 U.S. 962 (1971), and 369 F.2d 55, 62 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); *Johnson v. School District*, 339 F. Supp. 1815 (N.D. Cal. 1971), *application for stay pending appeal denied sub nom. Guey Heung Lee v. Johnson*, 404 U.S. 1215 (1971); ⁷ *Spencer v. Kugler*, 326 F. Supp. 1235, 1239, 1241-42 (D.N.J. 1971), *aff'd mem.*, 404 U.S. 1027 (1972); *Cisneros v. School District*, 324 F. Supp. 599, 616-20 (S.D. Tex. 1970), *supplemented by* 303 F. Supp. 1877, *application for reinstatement of stay granted*, 404 U.S. 1211 (1971), *aff'd in part, modified in part and remanded*, No. 71-2897 (5th Cir. August 2, 1972); *United States v. Texas*, 321

F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967), appellants also charge that appellees have violated Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

It is noted that Section 601 requires affirmative action by which a person is "excluded" from participation, "denied" the benefits, and "subjected" to discrimination.

Our determination of the merits of the other claims of appellants will likewise dispose of the claims made under the Civil Rights Act.

⁷ Oral argument of the appeals from the district court's judgment in this case, Nos. 71-1877-78, 71-2105, 71-2168, 71-2189, was heard before a panel of this court on January 14, 1972. Subsequently, Judge Madden, who was a member of the panel died, and Judge Browning was drawn by lot to replace him. By order of March 1, 1972, the panel vacated the submission of the case, to be set for reargument after the Supreme Court's disposition of *Keyes v. School District No. 1*, 445 F.2d 990 (10th Cir. 1971), *cert. granted*, 404 U.S. 1086 (1972).

F. Supp. 1043 (E.D. Tex. 1970), *supplemented by* 330 F. Supp. 235, *affd*, 447 F.2d 441 (5th Cir. 1971), *application for stay denied sub nom. Edgar v. United States*, 404 U.S. 1026 (1971), *cert. denied*, 404 U.S. 1016 (1972); *Spangler v. Pasadena Board of Education*, 311 F. Supp. 501 (C.D. Cal. 1970).

The parameters of de jure segregation are still being explored by the courts.⁸ If the neighborhood school system is manipulated by the school board in such a way as to create, encourage or foster racial imbalance, courts have determined that a constitutional violation has occurred. *E.g., Gomperts v. Chase, supra.* The courts have found de jure segregation where the school district has redrawn boundaries of existing schools so as to increase racial imbalance, by detaching compact, racially homogeneous neighborhoods from attendance zones for schools populated predominantly by members of another race. *See, e.g., Keyes v. School District No. 1, supra* at 1000-01; *Davis v. School District, supra* at 574; *Johnson v. School District, supra* at 1318, 1336-37; *United States v. Texas, supra* at 1049-50; *Cisneros v. School District, supra* at 617-18; ** Spangler v. Board of Education, supra* at 507-510.

Another indicium of de jure segregation is the selection of construction sites for and establishment of attendance boundaries of new schools. If this is done in such a way

⁸ Next term, the Supreme Court will hear *Keyes v. School District No. 1*, 445 F.2d 990 (10th Cir. 1971), *cert. granted*, 404 U.S. 1036 (1972), which raises the issue if and when the imposition of a neighborhood school system upon racially segregated residential patterns violates the Constitution. The Court has affirmed without opinion the judgment of the United States District Court for the District of New Jersey holding that drawing of school district boundaries which results in racially identifiable schools because of demographic patterns within the district is not *per se* unconstitutional. *Spencer v. Kugler*, 326 F. Supp. 1285 (D.N.J. 1971), *aff'd mem.*, 404 U.S. 1027 (1972).

⁹ *Cisneros v. School District*, 324 F. Supp. 599, 604-08 (S.D. Tex. 1970), *supplemented by* 330 F. Supp. 1377, *application for reinstatement of stay granted*, 404 U.S. 1211 (1971), *aff'd in part, modified in part and remanded*, No. 71-2397 (5th Cir., August 2, 1972), involves discrimination against Mexican-Americans, a readily identifiable ethnic-minority group the courts found were protected by the Equal Protection Clause.

as to increase the racial imbalance in schools, as by marking zones which coincide with racial residential patterns, courts have detected a constitutional violation. See, e.g., *Kelly v. Guinn*, *supra* at 105-07; *Keyes v. School District No. 1*, *supra* at 1000; *Davis v. School District*, *supra* at 575; *Johnson v. School District*, *supra* at 1318, 1337; *Cisneros v. School District*, *supra* at 617-19; *Spangler v. Board of Education*, *supra* at 517-18.

Similarly, if mobile units and additions are used to accommodate overcrowding in racially identifiable schools when the reassignment of students to schools populated predominantly by scholastics of another race would be feasible, *de jure* segregation has been perceived. See, e.g., *Keyes v. School District No. 1*, *supra* at 1000; *Johnson v. School District*, *supra* at 1318-19; *Cisneros v. School District*, *supra* at 618-19; *Spangler v. Board of Education*, *supra* at 518-19.

If the school district allows students to use transfers solely to move from minority to majority schools, courts have discerned a violation of the Constitution. See, e.g., *United States v. Texas*, *supra* at 1049; *Cisneros v. School District*, *supra* at 619; *Spangler v. Board of Education*, *supra* at 520-21.

School boards have likewise been charged with practicing *de jure* segregation if they hire and assign faculty on the basis of race, thereby creating racially identifiable schools. See, e.g., *Kelly v. Guinn*, *supra* at 106-07; *Johnson v. School District*, *supra* at 1318; *Cisneros v. School District*, *supra* at 619-20; *Spangler v. Board of Education*, *supra* at 513, 515.

Intra-class grouping, when it operates to separate students by race and without reference to ability, has been considered constitutionally infirm. See, e.g., *Spangler v. Board of Education*, *supra* at 519-20.¹⁰

And a state agency's failure to consolidate small school districts solely because each is populated by predominantly one and a different race was thought to contravene

¹⁰ Separate instruction of lingually deficient pupils can violate the Equal Protection Clause. See *Gonzales v. Sheely*, 96 F. Supp. 1004 (D. Ariz. 1951); *Mendez v. School District*, 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd on other grounds*, 161 F.2d 774 (9th Cir. 1947).

the constitutional mandate. See *United States v. Texas*, *supra* at 1047-48.

Appellants have neither alleged nor shown any such discriminatory actions by appellees. The evidence, that English is and has been uniformly used as the language of instruction in all district schools, does not evince the requisite discrimination in the maintenance of this otherwise proper policy.¹¹

Neither can appellants invoke the teachings of cases like *Gaston County v. United States*, 395 U.S. 285 (1969); *Griffin v. School Board*, 377 U.S. 218 (1964); *Lane v. Wilson*, 307 U.S. 268 (1939); *Guinn v. United States*, 238 U.S. 347 (1915); *United States v. Logue*, 844 F.2d 290 (5th Cir. 1965); *Meredith v. Fair*, 298 F.2d 696 (5th Cir. 1962); and *Franklin v. Parker*, 223 F. Supp. 724 (M.D. Ala. 1963), *aff'd as modified in other part*, 331 F.2d 841 (5th Cir. 1964). In those cases, facially neutral policies were held unconstitutional not simply because the burdens they created fell most heavily upon Blacks, but because the states' actions perpetuated the ill effects of past *de jure* segregation.

Although in its amicus curiae brief the Center for Law and Education, Harvard University, portrays appellants as "members of an identifiable racial minority which has historically been discriminated against by state action in the area of education . . .," Brief at 28,¹² appellants have alleged no such past *de jure* segregation. More importantly, there is no showing that appellants' lingual deficiencies are at all related to any such past discrimination. This court, therefore, rejects the argument that appellees have an affirmative duty to provide language instruction to compensate for appellants' handicaps, because they are carry-overs from state-imposed segregation. See *Swann v. Board of Education*, 402 U.S. 1, 15 (1971). If there are any such remnants, that appellants' primary

¹¹ "The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned." *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

¹² See *Guey Heung Lee v. Johnson*, 404 U.S. 1215 (1971).

language is Chinese has not been shown to be one of them.

It is with this reasoning in mind that we consider, and distinguish, *United States v. Texas*, No. 5281 (E.D. Tex., Dec. 6, 1971), a case which was brought to our attention by the Center Brief at 35-37, and heavily relied upon by appellants during oral argument. To be sure, in that order the court mandated bilingual education for Mexican-American and Anglo-American students in the San Felipe-Del Rio Consolidated Independent School District. However, the basis for that order was the court's prior determination, 321 F. Supp. 1043 (1970), *supplemented by* 330 F. Supp. 235, *aff'd*, 447 F.2d 441 (5th Cir.), *application for stay denied sub nom. Edgar v. United States*, 404 U.S. 1206 (1971), *cert. denied*, 404 U.S. 1016 (1972), that there had been de jure segregation. The purpose of the order was therefore, to "eliminate discrimination root and branch," *Green v. New Kent County Board of Education*, 391 U.S. 430 (1968), and to create a unitary school system with no [Mexican] schools and no white schools but just schools." *United States v. Texas*, No. 5281 (E.D. Tex., Dec. 6, 1971), unprinted opinion at 7; *accord*, 321 F. Supp. at 1052. As we have discussed, *supra*, such a rationale for requiring compensatory bilingual instruction is not applicable under the facts of this case.

In that case the court relied heavily upon a study by Dr. Cardenas concluding that the inability of the Mexican-American students to benefit from the educational system resulted from characteristics called "cultural incompatibilities" and English language deficiencies. These ethnically-linked traits—"albeit combined with other factors such as poverty, malnutrition and the effects of past educational deprivation" combine to identify this group and have "elicited from many school boards" the different and often discriminatory treatment. The court's comprehensive remedial education plan included mandated programs to develop language skills in a secondary language (English for many Mexican-American students, Spanish for Anglo students) so that "neither English nor Spanish is presented as a more valued language." Mem-

orandum Opinion Regarding the San Felipe-Del Rio Consolidated Independent School District No. 5281 (E.D. Texas, Dec. 6, 1971).

Every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system. That some of these may be impediments which can be overcome does not amount to a "denial" by the Board of educational opportunities within the meaning of the Fourteenth Amendment should the Board fail to give them special attention, this even though they are characteristic of a particular ethnic group. Before the Board may be found to unconstitutionally deny special remedial attention to such deficiencies there must be found a constitutional duty to provide them.

However commendable and socially desirable it might be for the School District to provide special remedial educational programs to disadvantaged students in those areas, or to provide better clothing or food to enable them to more easily adjust themselves to their educational environment, we find no constitutional or statutory basis upon which we can mandate that these things be done.

Appellants also rely on cases which have held it unconstitutional for a State to condition access to the criminal system upon the payment of money. *E.g., Mayer v. Chicago*, 404 U.S. 189 (1971); *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Draper v. Washington*, 372 U.S. 487 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Smith v. Bennett*, 365 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252 (1959); *Griffin v. Illinois*, 351 U.S. 12 (1956). See also *Tate v. Short*, 401 U.S. 395 (1971). Appellants reason that both criminal and education systems are products of State government to which appropriate persons must submit themselves.¹² And, just as

¹² All persons between the ages of six and sixteen are compelled to attend public school or receive equivalent education, Cal. Educ. Code § 12101. But see *Wisconsin v. Yoder*, No. 70-10, 40 U.S.L.W. 4476 (U.S. May 15, 1972).

the indigent convict cannot take proper advantage of the legal system available to him if he does not have a lawyer, or a sufficient record of his trial, or enough money to activate the review process or pay his fine, so the Chinese-speaking children in this case lost the benefits of the educational system because they cannot understand the language in which they are taught. Furthermore, the parallel continues, it is argued, in the fact that a convict's poverty is no more ascribable to the State than the language deficiency of these non-English-speaking Chinese students.

These criminal cases are distinguishable, however, because the ability of a convict to pay a fine or a fee imposed by the state, or to pay a lawyer, has no relationship to the purposes for which the criminal judicial system exists. Wealth is irrelevant to the factual determination of guilt, and is extraneous to resolution of related legal disputes. See *Mayer v. Chicago*, *supra* at 193, 196; *Griffin v. Illinois*, *supra* at 17-18, 21-22. See also *Tate v. Short*, *supra* at 399. In our case, on the other hand, the State's use of English as the language of instruction in its schools is intimately and properly related to the educational and socializing purposes for which public schools were established.¹⁴ This is an English-speaking nation. Knowledge of English is required to become a naturalized United States citizen, 8 U.S.C. § 1423(1); likewise, California requires knowledge of the language for jury service, Cal. Code Civ. P. § 198(2), (3). Similarly, an appreciation of English is essential to an understanding of legislative and judicial proceedings, and of the laws of the State. Cal. Const. art. IV, § 24; Cal. Code Civ. P. § 185, and of the nation. Use of English in the schools has this firm foundation, while the requirement of money payments in the criminal system does not.

Because we find that the language deficiency suffered by appellants was not caused directly or indirectly by any State action, we agree with the judgment of the district court and distinguish this case from *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny of de-

¹⁴ See note 11 *supra*.

jure cases. Under the facts of this case, appellees responsibility to appellants under the Equal Protection Clause extends no further than to provide them with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district.¹⁵ There is no evidence that this duty has not been discharged.

Appellants further complain that appellees have denied them equal protection by providing such remedial instruction as is made available on an unequal basis. Members of the first class of appellants receive no special help in English, while members of the second class are given compensatory instruction, some on a part-time and some on a full-time basis, and some through bilingual teachers and some with the ESL method.¹⁶

Both in the de jure cases and in the de facto cases (e.g., *Serrano v. Priest*, 5 Cal. 3d 548, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), the constitutional claim is predicated upon some form of State or governmental action, present or historical, which has created a classification asserted to be invidious and thus violative of the Fourteenth Amendment. The State has enacted laws creating separate schools based upon race, *Brown v. Board of Education*, *supra*, the State has passed laws for school financing favoring students in wealthy tax-base district, *Serrano v. Priest*, *supra*; laws for free text books which discriminate against the indigent, *Johnson v. New York State Education Department*, 449 F.2d 871 (2nd Cir. 1971). Here the State has established the schools, available to all without cost. The classification claimed invidious is not the result of laws enacted by the State presently or historically, but the result of deficiencies

¹⁵ *McLaurin v. Regents for Higher Education*, 339 U.S. 637 (1950), requires no more. There, a Black Ph.D. candidate, whom the segregated state university had admitted pursuant to court order, was assigned to a particular seat in the classroom in a row designated for Black students, to a Black table in the main reading room of the library, and to a specific table in the cafeteria. The Court held that these practices, violated the Equal Protection Clause, as it was defined before *Brown*. It ordered the school to accord the Black student the same treatment as other students in such matters. Appellees in the case before us have done no less.

¹⁶ Note 1 *supra*, and accompanying text.

created by the appellants themselves in failing to learn the English language. For this the Constitution affords no relief by reason of any of the Constitutional provisions under which appellants have sought shelter.

Furthermore, the determination of what special educational difficulties faced by some students within a State or School District will be afforded extraordinary curative action, and the intensity of the measures to be taken, is a complex decision, calling for significant amounts of executive and legislative expertise and nonjudicial value judgments.¹⁷ As with welfare, (to which these claims are closely akin), the needs of the citizens must be reconciled with the finite resources available to meet those needs. See *Dandridge v. Williams*, 397 U.S. at 472.

As long as there is no discrimination by race or national origin, as has neither been alleged nor shown by appellants with respect to this issue, the States should be free to set their educational policies, including special programs to meet special needs, with limited judicial intervention to decide among competing demands upon the resources at their commands, subject only to the requirement that their classifications be rationally related to the purposes for which they are created.

Dandridge, supra, also tells us that "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." 397 U.S. at 486-87. This echoes the language of *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 809 (1969), that,

"a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955); and a legislature need not run the risk of losing an entire re-

¹⁷ Appellants would have the court direct the type of instruction to be afforded them for remedial purposes even though there is a dispute among the experts as to whether bilingual teachers are better for this purpose than those who teach English as a Separate Language. The courts should not be called upon to make pedagogic judgments.

medial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attached."

Accord, Schlib v. Kuebel, 404 U.S. 357, 364 (1971), re-hearing denied, 405 U.S. 948 (1972); *Johnson v. Education Department*, 449 F.2d 871-77 (2d Cir. 1971); *Briggs v. Kerrigan*, 431 F.2d 967, 968-69 (1st Cir. 1970).

Judged by this standard, the administration of the compensatory education program for non-English-speaking Chinese children in the San Francisco Unified School District passes constitutional muster. Prior to the institution of this litigation, remedial instruction was provided as part of a pilot program.¹⁸ As such, emphasis would quite reasonably be on experimentation. Therefore, some children were given all their academic instruction within the program, and some were taken out of the regular school structure only part-time; some pupils were taught by bilingual teachers, and some received their instruction by the more intensive ESL method.¹⁹ Because of limited finances and the exploratory nature of the

¹⁸ In addition to the stipulated facts as to the numbers of Chinese and the portion of the total who need remedial help, the court found:

"Defendants [Appellees] recognize the importance of an education and equal educational opportunities, and make education available to plaintiffs [appellants] on the same terms and conditions as it is available to other groups within the School District."

"This Court recognizes that defendants have made efforts toward remedial education programs for Chinese-speaking students, although whether such efforts are effective or in need of substantial improvement is a conclusion which the Court does not make." C.T. at 419.

¹⁹ The record discloses that the 1,066 Chinese-speaking students who receive help (*supra*, footnote 1) consist of 487 Elementary School students (Grades 1-6 and Kindergarten), 342 Junior High School students and 237 Senior High School students. The 487 Elementary School students include a total of 45 who are of Kindergarten level. (C.T. at 239).

efforts, not all linguistically deficient Chinese children took part.²⁰

With due regard to the nature of the School District's efforts, nothing before this court would indicate that the program has been managed so as to invidiously discriminate against appellants. We find that appellees have not violated appellants' rights to equal protection in the administration of the compensatory program for non-English-speaking Chinese students within the District.

The judgment is affirmed.

HILL, District Judge, dissenting:

I dissent.

In my view, the majority's construction of the Equal Protection Clause is too narrow. They fail to assign sufficient value and importance to the rights plaintiffs assert in this case. A child's right to an equal educational opportunity is of the greatest importance and should not be abridged without persuasive justification. No such justification was presented to the trial court because that court held, at the threshold, that the facts presented by plaintiffs failed to make out a claim upon which relief could be granted under the Equal Protection Clause. While apparently conceding that plaintiffs have suffered a disadvantage in gaining an education as against English-speaking pupils, the trial court held that the disadvantage did not come within the scope of the Equal Protection Clause. The majority agree with that basic holding.

I would reverse the judgment and remand the case to the trial court for the taking of further evidence on de-

²⁰ The Chinese Bilingual Education Budget of the San Francisco Unified School District for the period 1966-1971 reflects the following allocations for the program:

1966-67—0
1967-68—\$88,016
1968-69—\$280,469
1969-70—\$432,969
1970-71—\$1,092,009

fendants' justification, if any, for their failure to provide the bilingual teaching which plaintiffs seek. The facts already adduced show, in my opinion, that the San Francisco School System withholds from a readily identifiable segment of an ethnic minority the minimum English language instruction necessary for that segment to participate in the educational processes with any chance of success. I view such a deprivation as being *prima facie* within the ambit of the Equal Protection Clause.

The plaintiffs, and the class they represent, are grade school children of Chinese parents who have recently immigrated to this country. The law requires these children to attend school; so, they come. But they enter the San Francisco School System unable to speak or understand the English language. All the instruction they receive is in English as are all of the books and all of the visual materials which are used. As the *amicus* brief from the Harvard University Center for Law and Education puts it, education for these children becomes "mere physical presence as audience to a strange play which they do not understand." These *amici* correctly stress the fact that the essence of education is communication: a small child can profit from his education only when he is able to understand the instruction, ask and answer questions, and speak with his classmates and teachers. When he cannot understand the language employed in the school, he cannot be said to have an educational opportunity in any sense. As against his English-speaking classmates, his educational opportunity is manifestly unequal even though there is an illusion of equality since the facilities, books, and teachers made available to him are the same as those made available to the rest of the students. It seems clear to me that a pupil knowing only a foreign language cannot be said to have an educational opportunity equal to his fellow students unless and until he acquires some minimal facility in the English language.

Interestingly enough, defendants themselves appear to recognize the seriousness of the problem. Two particularly forceful quotations from official publications of the San Francisco Unified School District are set forth below.

"(W)hen these [Chinese-speaking] youngsters are

placed in grade levels according to their age and are expected to compete with their English speaking peers, they are frustrated by their inability to understand the regular work. . . . For [these] children, the lack of English means poor performance in school. The secondary student is almost inevitably doomed to be a dropout and become another unemployable in the ghetto." San Francisco Unified School District, *Pilot Program: Chinese Bilingual*, (May 5, 1969), pp. 3a;6a, cited in Appellant's Opening Brief, p. 11.

"The immigrant family, in settling with its own people, has limited opportunities for assimilation into the American culture and language. Often, the immigrant student's only contact with the English language is during class time. After class, during lunch and recesses, the immigrant child tends to seek friends among other new arrivals. . . . In so doing, there develops a further bond of reinforcing the Chinese language. Few opportunities are afforded . . . for the student to speak English once he is back home in Chinatown." Dr. Robert E. Jenkins, Superintendent of Schools, San Francisco Unified School District, *Chinese Bilingual Education: A Preliminary Report* (1968), Clerk's Transcript, p. 244.

The majority misapprehend the nature of the relief sought in this case. They characterize plaintiffs as seeking "bilingual education." Plaintiffs have carefully and repeatedly abjured any such objective. As the complaint clearly states (Clerk's Transcript, pp. 23, 24) and as plaintiff's briefs in the trial court (Clerk's Transcript, p. 162) and in this Court re-emphasize, plaintiffs seek only that "defendants . . . provide special instruction in English and that such instruction . . . be taught by bilingual teachers." Appellant's Reply Brief, p. 12. When the majority emphasize that this is an "English-speaking nation" and that English is the "language of instruction" in all public schools, they set up a straw man which they have clothed in irrelevant truisms. Plaintiffs do not seek to be taught in Chinese, in whole or in part. They seek

only to learn English. They claim, with apparent justification, that they cannot learn English effectively unless it is taught to them by persons who have a facility in the only language they understand, i.e., Chinese. It seems abundantly clear that as soon as the plaintiffs have achieved enough proficiency in English to understand their teachers and classmates and participate somewhat in the course of instruction, they will expect no further Chinese to be uttered in their classes. They do not seek instruction in the Chinese language or to be taught anything in Chinese except how to speak English.

As stated, I am of the opinion that the facts (which are all stipulated to) reflect, *prima facie*, an impermissible infringement of plaintiffs' rights under the Equal Protection Clause. Plaintiffs have shown (1) that they do not have the same opportunity as others and (2) that the group so deprived is an identifiable segment of an ethnic minority.

As I understand the relevant legal principles, a *prima facie* denial of equal protection occurs whenever the method of classification with respect to the enjoyment or non-enjoyment of a governmental right, opportunity or obligation is "suspect." A classification is suspect whenever government action is linked with comparative disadvantage to members of a certain type of group. That group may be, *inter alia*, a religious, ethnic or political group or a group identifiable in terms of the members' sex or relative poverty.¹ Such classifications are suspect (and *prima facie* invalid) because these factors, i.e., religion, race, etc., are, except in extraordinary and rare instances, irrelevant and improper criteria in determining the scope or application of government rights, benefits, opportunities and obligations. They are suspect because, as one authority puts it, it is rarely the case that "proper governmental objectives . . . require for their achievement the carving out, for relatively disadvantageous treatment, of a class defined by [their racial or ethnic composition]."
Michelman, *The Supreme Court 1968 Term—Forward*:

¹ See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1966); *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Chance v. Bd. of Examiners*, 458 F.2d 1167 (2nd Cir. 1972).

On Protecting the Poor Through the Fourteenth Amendment, 83 Har.L.Rev. 7, 21 (1969).²

When government action particularly affects or burdens a given class or group, it is often called "discrimination." It is important to remember that no intent to discriminate is required in order to invoke the Equal Protection Clause. One can deal with an apparently neutral and non-discriminatory statute or scheme which is applied or enforced without any intent to discriminate (or even without knowledge that the effect is a discriminatory one) and still run afoul of the Equal Protection Clause if illegal discrimination in fact results.³ When such action particularly affects or burdens one of the

² In addition to being apparently arbitrary or irrational, Professor Michelman characterizes a suspect classification as one which has a high potential for abuse or for use as a tool by which a minority can be systematically deprived of equal access to the right and benefits the society offers. Furthermore, the criterion has a potential to hurt or stigmatize a group by implying official recognition of the group's inferiority or undeservingness. See Michelman, *supra*, at 20.

³ As the Fifth Circuit states, *en banc*, in disposing of a Petition for Rehearing in the case of *Hawkins v. Town of Shaw, Miss.*, 437 F.2d 1286 (5th Cir. 1971):

"In order to prevail in a case of this type it is not necessary to prove intent, motive, or purpose to discriminate on the part of city officials. We feel that the law on this point is clear, for 'equal protection of the laws means more than merely the absence of governmental action designed to discriminate; . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and to public interest as the perversity of a willful scheme.' *Norwalk CORE v. Norwalk Redevelopment Agency*, 2 Cir. 1968, 395 F.2nd 920, 921." *Hawkins v. Town of Shaw, Miss., Petition for Rehearing*, 461 F.2nd 1171 (5th Cir. 1972) at pp. 1172, 78. Furthermore, despite the fact that *Hawkins* arose in a situation where past historical discrimination could be inferred and where some evidence of present intent to discriminate was before the court, Judge Wisdom, in his concurrence in *Hawkins* on the Petition for Rehearing, makes clear that the case should "not be read to imply that our decision was based even in part on proof of motive, purpose, or intent," 461 F.2d at 1174. See also *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2nd Cir. 1970), cert. den. 401 U.S. 1010 (1971); *United States ex rel. Seals v. Wiman*, 304 F.2d 53 (5th Cir. 1962); *Chance v. Bd. of Examiners*, 458 F.2d 1167 (2nd Cir. 1972).

classes or groups mentioned above, it is presumptively illegal discrimination. However, not all discrimination is illegal. Discrimination which is apparently illegal may be excused by a showing that the discrimination or classification is justified by overriding governmental objectives and necessities.

As Judge Feinberg, in *Chance v. Board of Examiners*, 458 F.2d 1167 (2nd Cir. 1972), states: "A harsh racial [or ethnic] impact, even if unintended, amounts to an invidious *de facto* classification that cannot be ignored or answered with a shrug. At the very least, the Constitution requires that state action spawning such a classification 'be justified by legitimate state considerations.'" 458 F.2d at 1175.

The strength of the justification needed to overcome a *prima facie* violation of the Equal Protection Clause will vary depending on the nature of the right involved. When the right involved is a fundamental one, only a compelling state interest will justify its abridgment, and the discrimination must be necessary to the achievement of the overriding governmental interest. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1968); *Dunn v. Blumstein*, 405 U.S. 330 (1972). Cf. *Dillenburg v. Kramer*, — F.2d — (9th Cir. 1972). When the right involved is less fundamental, a less compelling reason may suffice to justify its abridgment, and the discrimination may be permitted as *rationally related* to the achievement of an overriding governmental aim. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970).

Turning now to the rights involved in this case, it cannot be doubted that the right to equal educational opportunity is one of the most vital and fundamental of all of the rights enjoyed by Americans. The Supreme Court, in *Brown v. Board of Education*, characterized it as "perhaps the most important function of state and local governments" and observed that "(i)n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." 347 U.S. at 493.

Thus, when defendants are given the opportunity to present their justification, their showing would necessar-

ily be required to be persuasive in the extreme. The present record certainly shows no such justification. At best, it indicates that the defendant school board has made some effort to remedy the language deficiency of some of the Chinese-speaking students. That partial effort is not a full justification. It merely goes to reduce the dimensions of the problem.

The defendants could be allowed to show, in the resumed trial, the limits of their resources, the conflicting demands made upon those resources, and their judgment as to the priorities to be applied to those resources and demands. And the court would then decide whether the defendants are justified in their refusal to provide bilingual instruction for the teaching of English to all of the Chinese-speaking pupils who require it.

The majority apparently foreclose plaintiffs from relief under the Equal Protection Clause because their language deficiency was not "caused directly or indirectly by any state action." In other words, the majority see the Equal Protection Clause as available only when the inequality or discrimination results from some present intent to discriminate or from some past or historical governmental discriminatory conduct for which the state can be blamed. The majority cite no previous decision which so limits the scope of the Equal Protection Clause. It is true that most, if not all, of the decided cases requiring remedial action to redress educational deprivation arose where there was a history of unequal treatment by the state of the class involved. But none of the opinions hold that historical disadvantage attributable to the state is a *sine qua non* for obtaining relief.

In another group of cases it is clear that relief is granted under the Equal Protection Clause where no historical blame can be placed upon the state. These cases deal with the obligation of the state to provide special services to criminal defendants who are unable to pay for those services themselves. Some of these Supreme Court opinions on the subject are collected in the footnote.* These cases stand for the proposition that a

* *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Anders v. California*, 386 U.S. 738 (1966);

person's poverty may not be the basis for denying him the same facilities and aids in combatting criminal charges against him as are enjoyed by those who can pay for such facilities and aids with their own funds. Affirmative state action is required to redress the inequality, and the state's duty to redress is imposed without reference to whether or not it can be said that the state in some way caused the inequality in the first place. The state's duty to take affirmative action does not arise because it can be said that the state is primarily responsible for making a poor man poor. Rather, the duty arises because the state must put justice within reach of every man if the state chooses to provide a system of criminal justice at all. Similarly, when the state chooses to provide education and makes attendance at school compulsory, it has a duty to grant to each child an equal educational opportunity and a duty to avoid illegal discrimination. That duty does not arise because of the existence of either a present intent to discriminate or past historical discrimination. Rather, the duty arises because once the state chooses to put itself in the business of educating children, it must give each child the best education its resources and priorities allow.

One last word. The plaintiffs in this case are small, Chinese-speaking children who sue on their own behalf and on behalf of others similarly situated. The majority describe the plight of these children as being "the result of deficiencies created by the appellants themselves in failing to learn the English language." To ascribe some fault to a grade school child because of his "failing to learn the English language" seems both callous and inaccurate. If anyone can be blamed for the language deficiencies of these children, it is their parents and not the children themselves. Even if the parents can be faulted (and in many cases they cannot, since they themselves are newly arrived in a strange land and in their struggle

Roberts v. LaVallee, 389 U.S. 40 (1967). In *Roberts*, the Supreme Court stated that "(o)ur decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." 382 U.S. at 42.

for survival may have had neither the time nor opportunity to study any English), it is one of the keystones of our culture and our law that the sins of the fathers are not to be visited upon the children.

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SUPREME COURT OF THE UNITED STATES

No. 72-6520

KINNEY KINMON LAU, a minor by and through

MRS. KAM WAI LAU, his guardian ad litem,
ET AL., PETITIONERS

v.

ALAN H. NICHOLS, ET AL.

On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the said motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 11, 1978

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 26,155

KINNEY KINMON LAU, a Minor, by and through
MRS. KAM WAI LAU, his Guardian ad Litem,
ET AL., APPELLANTS

v.

ALAN H. NICHOLS, President, ET AL., APPELLEES

[June 18, 1978]

Before: CHAMBERS and TRASK, Circuit Judges, and
HILL,* District Judge

ORDER

On request of a member of the court who was not a member of the panel, proceedings were commenced in February 1978 to obtain a vote of the court to consider the case en banc.

All members of the court in active service have considered the request for en banc consideration. A majority of the court has rejected the request.

Judge Hufstedler, with whom Judge Ely concurs, files an opinion dissenting from the rejection of en banc consideration.

Judge Trask, with whom Judge Wright concurs, files a special concurring opinion.

HUFSTEDLER, Circuit Judge, with whom Judge Ely concurs, dissenting from the denial of hearing en banc:

I dissent from the rejection of en banc consideration. The case presents unusually sensitive and important con-

* For the Central District of California, sitting by designation.

stitutional issues. The majority opinion states principles of statutory and constitutional law that cannot be reconciled with controlling authority. Unless these principles are corrected now, the protections of the Civil Rights Acts will be seriously impaired in this Circuit.

The majority opinion correctly identifies the two groups of children who brought this action: (1) 1,790 Chinese school children who speak no English and are taught none, and (2) 1,066 Chinese children who speak no English and who receive some kind of remedial instruction in English. The majority's characterization of the relief sought as "bilingual education" is misleading. The children do not seek to have their classes taught in both English and Chinese. All they ask is that they receive instruction in the English language.

Access to education offered by the public schools is completely foreclosed to these children who cannot comprehend any of it. They are functionally deaf and mute. Their plight is not a matter of constitutional concern, according to the majority opinion, because no state action or invidious discrimination is present. The majority opinion says that state action is absent because the state did not directly or indirectly cause the children's "language deficiency", and that discrimination is not invidious because the state offers the same instruction to all children. Both premises are wrong.

The state does not cause children to start school speaking only Chinese. Neither does a state cause children to have black skin rather than white nor cause a person charged with a crime to be indigent rather than rich. State action depends upon state responses to differences otherwise created.

These Chinese children are not separated from their English-speaking classmates by state-erected walls of brick and mortar (*Cf. Brown v. Board of Education* (1954) 347 U.S. 483), but the language barrier, which the state helps to maintain, insulates the children from their classmates as effectively as any physical bulwarks. Indeed, these children are more isolated from equal educational opportunity than were those physically segre-

gated blacks in *Brown*; these children cannot communicate at all with their classmates or their teachers.

The state's response to the non-English speaking Chinese children is not passive. The state compels the children to attend school (Cal. Educ. Code § 12101), mandates English as the basic language of instruction (Cal. Educ. Code § 71),¹ and imposes mastery of English as a prerequisite to graduation from public high school (Cal. Educ. Code § 8573).² The pervasive involvement of the State with the very language problem challenged forbids the majority's finding of no state action. (*E.g., Bullock*

¹ Cal. Educ. Code § 71:

"English shall be the basic language of instruction in all schools.

"The governing board of any school district and any private school may determine when and under what circumstances instruction may be given bilingually.

"It is the policy of the state to insure the mastery of English by all pupils in the schools; provided that bilingual instruction may be offered in those situations when such instruction is educationally advantageous to the pupils. Bilingual instruction is authorized to the extent that it does not interfere with the systematic, sequential, and regular instruction of all pupils in the English language.

"Pupils who are proficient in English and who, by successful completion of advanced courses in a foreign language or by other means, have become fluent in that language may be instructed in classes conducted in that foreign language."

² Cal. Educ. Code § 8573:

"No pupil shall receive a diploma of graduation from grade 12 who has not completed the course of study and met the standards of proficiency prescribed by the governing board. Standards of proficiency in basic skills shall be such as will enable individual achievement and ability to be ascertained and evaluated. Requirements for graduation shall include:

- (a) English.
- (b) American history.
- (c) American government.
- (d) Mathematics.
- (e) Science.
- (f) Physical education, unless the pupil has been exempted pursuant to the provisions of this code.
- (g) Such other courses as may be prescribed."

v. Carter (1972) 405 U.S. 134; Burton v. Wilmington Parking Authority (1961) 365 U.S. 715; Shelley v. Kraemer (1948) 334 U.S. 1; Nixon v. Condon (1932) 286 U.S. 73.)

The majority opinion concedes that the children who speak no English receive no education and those who are given some help in English cannot receive the same education as their English speaking classmates. In short, discrimination is admitted. Discriminatory treatment is not constitutionally impermissible, they say, because all children are offered the same educational fare, i.e., equal treatment of unequals satisfies the demands of equal protection. The Equal Protection Clause is not so feeble. Invidious discrimination is not washed away because the able bodied and the paraplegic are given the same state command to walk.

The majority holdings are contrary to a cascade of Supreme Court authority. Although the majority opinion acknowledges the existence of many of these cases, it attempts to circumvent them by reducing state action concepts to levels unacceptable for a hundred years and by drawing distinctions to confine the prior cases to an uncharted jurisprudential territory remote from the San Francisco schools. The great equal protection cases cannot be shrivelled to the size the majority opinion has prescribed.

Even if the strict scrutiny test were inapplicable, the Chinese children made out a *prima facie* case. A claim of invidious discrimination against those who could speak and write only Chinese came to the Supreme Court almost 50 years ago in *Yu Cong Eng v. Trinidad* (1926) 271 U.S. 500. The Philippines had enacted a statute requiring business account books to be kept solely in English, Spanish, or any local dialect. The petitioner, a Chinese merchant who could neither speak nor write any language except Chinese challenged the statute on due process and equal protection grounds. The Philippine statute, like the California statutes here involved, was facially neutral. Mr. Chief Justice Taft, speaking for a

unanimous court, struck down the statute as a denial of equal protection.*

The classifications that are relevant to our equal protection problem in this case can be defined in a number of ways. It is unnecessary to describe more than three of them to structure the constitutional inquiry. The narrowest classification created by state action is this: (1) all Chinese school children in the district who can speak English versus (2) all Chinese school children in the district who cannot speak English and are taught no English, represented by a group of 1,790 plaintiffs. Children in the first class have full access to education; those in the second have none. The sole difference between them is linguistic. Is the denial of instruction to learn English—and hence to learn anything—rationally related to any legitimate state end? The state offers no rationale, and I am unable to discern any.

A second classification is: (1) all Chinese school children who do not speak English and are taught none versus (2)(a) children identically situated who receive six hours per day of special instruction, represented by a group of 433 plaintiffs, and (2)(b) children also identically situated who receive one hour per day of special instruction, represented by a group of 633 plaintiffs. Although some special education is provided, it is not made available to all on an equal basis. See *Brown v. Board of Education* (1954) 347 U.S. 483; *Griffin v. Illinois* (1956) 351 U.S. 12.) Nothing appears on the face of the record to explain why children are placed in one class rather than another. It is thus impossible to deter-

* In our case, unlike *Yee Cong Eng*, there is no indication that California intended the language statutes to injure Chinese. But it is now abundantly clear that good faith is irrelevant if in fact the impact of state action is discriminatory. E.g., *Burton v. Wilmington Parking Authority*, *supra*, 365 U.S. 715, 725; cf. *Baker v. Carr* (1962) 369 U.S. 186. California's record of deliberate discrimination against Chinese and Japanese is nevertheless lengthy. One of the sadder chapters in that melancholy history was an order of the San Francisco school board in October, 1906, compelling all Oriental children to attend a segregated school in Chinatown. The order was ultimately withdrawn under pressure of litigation, of Congress, and of the President of the United States. *McWilliams, Prejudice* p. 26 (1944).

mine whether the basis of distinction has any rational connection to any legitimate state aim.⁴

A third classification is: (1) all Chinese non-English speaking children who receive some remedial tutelage in English versus (2) all of their classmates who speak English. It is conceded that children in the first class have much narrower access to education than children in the second. Is there a rational basis for declining to bridge the educational gap between the two classes? Again the state has not been required to supply one, and there is no showing in the record that those children, or any portion of them, in the first class are afforded a meaningful opportunity to a minimum public education. Here, as in *Bullock v. Carter* (1972) 405 U.S. 134; *Reed v. Reed* (1971) 404 U.S. 71; *Tate v. Short* (1971) 401 U.S. 395; *Williams v. Illinois* (1970) 399 U.S. 235; *Douglas v. California* (1963) 372 U.S. 353; *Griffin v. Illinois* (1956) 351 U.S. 12; *Brown v. Board of Education* (1954) 347 U.S. 483; *Yick Wo v. Hopkins* (1886) 118 U.S. 356, the state has participated in discriminating against a clearly identifiable class and its failure to remedy the discriminatory practice has not been justified at all.

The state did not meet even its minimal burden. But its obligation was to meet the far more stringent test of strict scrutiny. The Chinese children have met *prima facie* even the rigorous standards of *San Antonio Independent School District v. Rodriguez* (1973) ____ U.S. ____: (1) They are members of a class precisely identifiable, (2) the state has participated in discriminating against them, (3) the children who speak no English and are taught none are absolutely deprived of education and it has not been shown that those who are taught some English have a meaningful access to an adequate education. *San Antonio Independent School District v.*

⁴ This is not a case like *Dandridge v. Williams* (1970) 397 U.S. 471 where there was a clear basis for distinguishing between welfare recipients stated in the regulation at issue. The requirements of *Dandridge*—"It is enough that the State's action be rationally based and free from invidious discrimination." (*Id.* at 487)—have not been met in this case.

Rodriguez is the most recent pronouncement in a lengthy chain of equal protection cases. But even if it stood alone, *San Antonio Independent School District* would compel reversal.

TRASK, Circuit Judge, with whom Judge Wright concurs, specially concurring in the rejection of en banc consideration:

A basic misapprehension of the factual situation seems to color, if not pervade, the dissent from the court's refusal to grant en banc consideration. This appears from the statement that "the majority opinion concedes that the children who speak no English receive no education. . . ." The stipulation upon which the case was submitted for decision [footnote 1 of majority opinion] refers to 2,856 Chinese-speaking students in the school district "who need *special instruction* in English." It continues by dividing those students into one group who receive designated amounts of special help in English and those who do not. Those who do not, however, are not assumed "to receive no education." Although some do not receive special help, there is no indication that they are not exposed to whatever English courses are afforded. The majority opinion does not equate the need for "special help" in English with receiving "no education."

Little comfort for the dissent may be found in *San Antonio Independent School District v. Rodriguez*, 41 U.S.L.W. 4407 (Mar. 21, 1978). Although the Chinese here were an identifiable group "who needed special help in English" [Stipulation, footnote 1], they were a small portion of approximately 15,500 Chinese students. It is not difficult to assume that they were part of an even larger group of students "who need special help in English." As the Court, where wealth is involved, "require absolute equality or precisely equal advantages." Continuing,

"Nor, indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense." 41 U.S.L.W. at 4414.

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PREME COURT U.S.

U.S. SUPREME COURT, W.C.
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In the
Supreme Court of the United States

MICHAEL ROSEN, JR., CLERK

OCTOBER TERM, 1972

No.

MISC.

KINNEY KINMON LAU, A Minor by and through
MRS. KAM WAI LAU, his guardian ad Litem, et al.,
PETITIONERS,

v.

ALAN H. NICHOLS, et al.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CENTER FOR
LAW AND EDUCATION, HARVARD UNIVERSITY
IN SUPPORT OF THE PETITION

MARIAN WRIGHT EDELMAN
J. HAROLD FLANNERY
ROGER L. RICH

*Center for Law and Education
Harvard University*